Supreme Court, U.S.
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IN THE SUPREME COURT OF THE
UNITED STATES

OCTOBER TERM 1998

GEORGE ALARICK JONES,
PETITIONER
VS.

THE STATE OF TEXAS,
RESPONDENT

PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF CRIMINAL APPEALS
OF THE STATE OF TEXAS

PETITION FOR WRIT OF CERTIORARI

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CAPITAL CASE

QUESTIONS PRESENTED

1. Did the Texas Court of Criminal Appeals promulgate a retroactive rule of jury selection relating to challenges for cause in death penalty cases which denied Petitioner his constitutional rights under the Sixth, Eighth and Fourteenth Amendments to the United States Constitution; and which conflicts with the federal and state rule of law?
2. Do the Fourteenth Amendment to the United States Constitution guarantees to equal protection and due process under the law, as well as the Eighth Amendment, render Texas Code of Criminal Procedure, unconstitutional for allowing Petitioner to be sentenced to death based upon the admission of evidence otherwise illegal and inadmissible in all other criminal trials?

LIST OF THE PARTIES

Petitioner: George Alarick Jones

Respondent: State of Texas

TABLE OF CONTENTS

QUESTIONS PRESENTED.....i

LIST OF PARTIES.....ii

TABLE OF CONTENTS.....iii

LIST OF AUTHORITIES.....iv – viii

CITATION TO UNDERLYING HISTORY.....1

JURISDICTIONAL BASIS.....2

CONSTITUTIONAL AND STATUTORY PROVISIONS.....2 – 6

STATEMENT OF THE CASE.....6 – 14

REASONS FOR GRANTING THE WRIT.....14 – 33

QUESTION NO. 1.....14 – 30

QUESTION NO. 2.....31 – 33

CONCLUSION.....34 – 36

CERTIFICATE OF SERVICE.....37

APPENDIX.....38

OPINION OF THE TEXAS

COURT OF CRIMINAL APPEALS

982 S.W.2D 386 (1998).....A1 – A37

LIST OF AUTHORITIES

Federal Constitutional Provisions:

1. United States Constitution, Article 1, Section 10
2. United States Constitution, Amendment 6
3. United States Constitution, Amendment 8
4. United States Constitution, Amendment 14

Federal Caselaw:

5. Ake v. Oklahoma, 470 U.S. 68, 105 S.Ct. 1987, 84 L.Ed.2d 53 (1985).
6. Batson v. Kentucky, 476 U.S. 79, 90 L.Ed.2d 69 (1986)
7. Eddings v. Oklahoma, 455 U.S. 104, 118 S.Ct. 869, 71 L.Ed.2d 1 (1982).
8. Edmonson v. Leesville Concrete Company, Inc., 500 U.S. 614, 111 S.Ct. 2077, 114 L.Ed.2d 660 (1991).
9. Fay v. People of the State of New York, 332 U.S. 261, 67 S.Ct. 1613, 91 L.Ed. 2043
10. Kotteakos v. U.S., 328 U.S. 750 (1946)
11. Linkletter v. Walker, 381 U.S. 618, 85 S.Ct. 1731, 14 L.Ed.2d 601
12. Palko v. Connecticut, 302 U.S. 319, 58 S.Ct. 149, 82 L.Ed. 288 (1937).
13. Powers v. Ohio, 499 U.S. 400, 111 S.Ct. 1364, 113 L.Ed.2d 411 (1991)
14. Rochin v. California, 342 U.S. 165, 72 S.Ct. 205, 96 L.Ed. 183 (1952)

15. Tumey v. State of Ohio, 273 U.S. 510, 47 S.Ct. 437, 71 L.Ed. 749
16. United States v. Cornell, 25 F.Cas. 650 (D.R.I. 1820)(No. 14,868)
17. U.S. v. Prati, 861 F.2d 82 (Fifth Cir. 1988)
18. Witherspoon v. Illinois, 391 U.S. 510 (1968)
19. Woodson v. North Carolina, 428 U.S. 280, 96 S.Ct. 2978, 49 L.Ed. 2d 944 (1976).

Federal statutes:

18. Federal Rules of Criminal Procedure 52(a)

State Constitutional provisions:

19. Texas Constitution, Article 1, Section 3
20. Texas Constitution, Article 1, Section 10
21. Texas Constitution, Article 1, Section 13
22. Texas Constitution, Article 1, Section 19

State Cases:

23. Arnold v. State, 786 S.W.2d 295 (Tex.Cr.App. 1990)
24. Bell v. State, 724 S.W.2d 780 (Tex.Cr.App. 1986)
25. Burks v. State, 876 S.W. 877, reh. den., cert. Den. 115 S.Ct. 909, 513 U.S. 114, 130 L.Ed.2d 791
26. Flowers v. State, 935 S.W.2d 131 (Tex.Cr.App. 1996)
27. Grijalva v. State, 614 S.W.2d 420 (Tex.Cr.App. 1981)
28. Johnson v. State, 967 S.W.2d 410 (Tex.Cr.App. 1998)
29. Jones v. State, 982 S.W.2d 386 (Tex.Cr.App. 1998)

30. King v. State, 953 S.W.2d 266 (Tex.Cr.App. 1997)
31. Lawson v. State, 148 S.W. 587 (1912)
32. Payton v. State, 572 S.W.2d 677 (Tex.Cr.App. 1978)
33. Romero v. State, 800 S.W.2d 539 (Tex.Cr.App. 1990)
34. Turner v. State, 635 S.W.2d 734 (Tex.Cr.App. 1982)
35. Villareal v. State, 576 S.W.2d 51 (Tex.Crim.App.), cert.den. 100 S.Ct. 176 (1978).
36. Vuong v. State, 830 S.W.2d 929 (Tex.Cr.App.), cert.den., 113 S.Ct. 595 (1992).
37. Warmoski v. State, 853 S.W.2d 575 (Tex.Cr.App. 1990)

State Statutes:

38. Texas Code of Criminal Procedure Article 35.13
39. Texas Code of Criminal Procedure Article 35.16
40. Texas Code of Criminal Procedure Article 35.25
41. Texas Code of Criminal Procedure Article 37.071(2)(b)
42. Texas Code of Criminal Procedure Article 37.071(2)(h)
43. Texas Code of Criminal Procedure Article 38.14
44. Texas Government Code Annotated, Section 22.108(a)
45. Texas Rules of Appellate Procedure 44.2 (a)(b)
46. Texas Rules of Appellate Procedure 81(b)(2)

State Cases of Other Jurisdictions:

46. Cook v. State, 369 So.2d 1251 (Ala. 1978)
47. Fair v. State, 245 Ga. 868, 268 S.E.2d 316, cert.den. 449 U.S. 986, 101 S.Ct. 407, 66 L.Ed.2d 250 (1980).
48. State v. Bobo, 727 S.W.2d 945, (Tenn. 1987), cert.den. 484 U.S. 872, 108 S.Ct. 204, 98 L.Ed.2d 155.

49. State v. McCormick, 272 Ind. 272, 397 NE.2d 276 (1979)

50. State v. Skipper, 285 S.C. 42, 328 S.E. 2d 1251 (Ala. 1978), rev'd on other grounds, 476 U.S. 1, 106 S.Ct. 1669, 90 L.Ed.2d 1 (1986).

CITATION TO THE UNDERLYING CASE

On March 22, 1995, Petitioner was sentenced to die after trial in the 282nd District Court, Dallas County, Texas in Cause No. F94-03320-PV. Following automatic direct appeal to the Texas Court of Criminal Appeals, the Court affirmed the trial court judgment in 982 S.W.2d 386 (Tex.Cr.App. 1998) [Slip Op. No. 72,135]. Motion for Rehearing was denied and entered on December 9, 1998.

JURISDICTIONAL BASIS

On September 16, 1998, the Texas Criminal Court of Appeals denied the direct appeal of Petitioner, in 982 S.W.2d 386. On December 9, 1998, Petitioner's Motion for Rehearing was denied and entered without published opinion. This Petition for Writ of Certiorari is timely filed within 90 days of the final denial of the state court of last resort, being March 9, 1999.

Petitioner raises questions of denial of his constitutional rights, and invokes the jurisdiction of this Honorable Court under Supreme Court Rule 10(b) and (c). Petitioner maintains that the rule of challenges for cause in jury selection of a death penalty case, as created in this instant case conflicts with federal and state law; and presents a question not previously settled by this Court. Petitioner

further asserts that Texas Code of Criminal Procedure Article 37.071(2)(b) is unconstitutional, as violative of the Fourteenth Amendment to the United States Constitution.

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Sixth Amendment to the United States Constitution provides: In all criminal prosecutions the accused shall have a speedy and public trial by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law.

The Eighth Amendment to the United States Constitution provides: Excessive bail shall not lie required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

Pertinent portions of the Fourteenth Amendment to the United States Constitution provide: Section 1. ...No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State derive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Fed.R.Crim.Proc. 52(a) provides: Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded.

The Texas Constitution Article I, §3 provides: All free men, when they form a social compact, have equal rights, and no man, or set of men, is entitled to exclusive separate public emoluments, or privileges, but in consideration of public services.

The Texas Constitution Article I, §10 provides: In all criminal prosecutions the accused shall have a speedy public trial by an impartial jury.

The Texas Constitution Article I, § 13 provides: Excessive bail shall not be required, nor excessive fines imposed, nor cruel or unusual punishment inflicted. All courts shall be open, and every person for an injury done him, in his lands, goods, person or reputation, shall have remedy by due course of law.

The Texas Constitution Article 1 §19 provides: No citizen of this State shall be deprived of life, liberty, property, privileges or immunities, or in any manner disfranchised, except by the due course of the law of the land.

Texas Code of Criminal Procedure Annotated art. 35.13 provides: A juror in a capital case in which the state has made it known that it will seek the death penalty, held to be qualified, shall be passed for acceptance or challenge first

to the state and then to the defendant. Challenges to jurors are either peremptory or for cause.

Texas Code of Criminal Procedure Annotated art. 35.16 (b)(3) provides: (b) A challenge for cause may be made by the State for any of the following reasons:

3. That he has a bias or prejudice against any phase of the law upon which the State is entitled to rely for conviction or punishment.

Texas Code of Criminal Procedure Annotated art. 35.25 provides: In non-capital cases and in capital case in which the State's attorney has announced that he will not qualify the jury for, or seek the death penalty, the party desiring to challenge any juror peremptorily shall strike the name of such juror from the list furnished him by the clerk.

Texas Code of Criminal Procedure Annotated Article 38.14 provides: A conviction cannot be had upon the testimony of an accomplice unless corroborated by other evidence tending to connect the defendant with the offense committed; and the corroboration is not sufficient if it merely shows the commission of the offense.

Texas Rules of Appellate Procedure §44.2 provides: (a). Constitutional error. If the appellate record in a criminal case reveals constitutional error that is subject to harmless error review, the court of appeals must reverse a judgment of conviction or punishment unless the court determines beyond

a reasonable doubt that the error did not contribute to the conviction or punishment.

(b). Other errors. Any other error, defect, irregularity, or variance that does not affect substantial rights must be disregarded.

Texas Rules of Appellate Procedure 81(b)(2) provides: If the appellate record in a criminal case reveals error in the proceeding below, the appellate court shall reverse the judgment under review, unless the appellate court determines beyond a reasonable doubt that the error made no contribution to the conviction or to the punishment.

Texas Code of Criminal Procedure Article 37.071, Section 2(a) provides: If a defendant is tried for a capital offense in which the state seeks the death penalty, on a finding that the defendant is guilty of a capital offense, the court shall conduct a separate sentencing proceeding to determine whether the defendant shall be sentenced to death or life imprisonment. The proceeding shall be conducted in the trial court and, except as provided by Article 44.29(c) of this code, before the trial jury as soon as practicable. In the proceeding, evidence may be presented by the state and the defendant or the defendant's counsel as to any matter that the court deems relevant to sentence, including evidence of the defendant's background or character or the circumstances of the offense that mitigates against the imposition of the death penalty. This subsection shall not be construed to

authorize the introduction of any evidence secured in violation of the Constitution of the United States or of the State of Texas. The state and the defendant or the defendant's counsel shall be permitted to present argument for or against sentence of death. The court, the attorney representing the state, the defendant, or the defendant's counsel may not inform a juror or prospective juror of the effect of a failure of a jury to agree on issues submitted under Subsection (c) or (e) of this article.

Texas Code of Criminal Procedure Article 37.071, Section 2(h) provides: The judgment of conviction and sentence of death shall be subject to automatic review by the Court of Criminal Appeals.

Texas Government Code Annotated § 22.108(a) provides: The court of criminal appeals is granted rulemaking power to promulgate rules of posttrial, appellate, and review procedure in criminal cases except that its rules may not abridge, enlarge, or modify the substantive rights of a litigant.

STATEMENT OF THE CASE

Petitioner filed an automatic direct appeal to the Texas Court of Criminal Appeals maintaining in part, that during jury selection, the trial court improperly sustained the State's challenge for cause against Veniremember Margaret Snyder. At trial, and on direct appeal, as well as on Motion for Rehearing, Petitioner timely, specifically and repeatedly

alleged deprivation of his constitutional rights to an impartial jury and due process under the law in wrongfully permitting the improper exclusion of an otherwise qualified juror:

> "THE COURT: ...I'll sustain the State's challenge.
>
> "MR. PARKS: And of course, Your Honor, the Defense would object to that and maintain that this is a qualified juror, that the Court's exclusion of this person from the jury, the granting of the State's challenge for cause violates this Defendant's Sixth and Fourteenth Amendment rights to due process of law, the protection of the laws of an impartial jury under the United States Constitution, and is violative of the Texas Constitution due course of law provisions, Article 1, Section 10, of the Texas Constitution." (R. XXIX, 2418-2419).
>
> "POINT OF ERROR NO. 1: The trial court erred in granting the State's Challenge for Cause of Juror Margaret Snyder for considering an accomplice witness to be a discredited witness.
>
> "POINT OF ERROR No. 2: The trial court erred in granting the State's Challenge

for Cause of Juror Margaret Snyder because the record does not establish that her views would prevent or substantially impair her performance of her duties as a juror." (Appellant's Brief on Direct Appeal, page 13; 15-26)

"GROUND FOR REVIEW NO. 1 The majority opinion erred in holding that the exclusion of an otherwise qualified juror in a capital case after the trial court wrongfully sustained a State's challenge for cause is error of constitutional dimension pursuant to TX.R.App.Proc. Rule 44.2(a)

"GROUND FOR REVIEW NO 2: The majority opinion erred in holding that the exclusion of an otherwise qualified juror in a capital case after the trial court wrongfully sustained a State's challenge for cause is not even non-constitutional error pursuant to Tx.R.App. Proc. 44.2.

"GROUND FOR REVIEW NO. 3: The majority opinion erred in analyzing the exclusion of an otherwise qualified juror in a capital murder case, wrongfully excluded on an improper granting of a State's challenge for cause, to be other than constitutional error in

violation of the court's own rule making authority.

"GROUND FOR REVIEW NO. 4: The majority opinion erred in holding that a new standard for measuring the exclusion of otherwise qualified jurors in a capital murder case and applying that new standard retroactively to this appellant was not violative of appellant's rights to due process and to be free from *ex post facto* applications of the law.

"GROUND FOR REVIEW NO. 5: The majority opinion erred in that it sets an impossible standard for prospective appellants to meet to constitute reversible error when a trial court improperly excludes from the venire panel an otherwise qualified juror on an improper challenge for cause by the State.

"GROUND FOR REVIEW NO. 6: The majority opinion errs and violates fundamental fairness in the trial process by effectively granting the State unlimited preemptory challenges if such challenges are characterized as challenges for cause." (Appellant's Motion for Rehearing, pgs 2-3).

The Texas Court of Criminal Appeals held that the exclusion of the juror was improper, and that Venireperson Snyder was a qualified juror. *Jones v. State,* 982 S.W.2d 386, (Tex.Cr.App. 1998); (Appendix pgs 1-38). The Court further held that the error was not of constitutional dimension; and that it did not affect the substantial rights of the Petitioner. (Appendix pgs. 14 and 18). Motion for Rehearing was denied.

Petitioner was originally indicted under Cause No. F93-33522-US, for the offense of capital murder, which alleged that on April 13, 1993, Petitioner knowingly and intentionally caused the death of Forest J. Hall, an individual, by shooting the said Forest Hall with a firearm and that Petitioner intentionally caused the death in the course of committing and attempting to commit the offense of robbery. Jury selection ended by mistrial. Re-indicted on September 21, 1994, under Cause No. F94-03320-PV, Petitioner faced jury selection once again on October 7, 1994. A jury was seated, and the trial commenced on March 20, 1995. Three days later the jury returned a verdict of guilty. Following the separate sentencing phase, the jury returned answers to the Special Issues which resulted in a sentence of death.

During jury selection, Venireperson Margaret Snyder was challenged for cause by the State on the ground that she would prejudge the credibility of the testimony of an accomplice witness. Thereafter, the State also based the challenge for cause on the following grounds: (1). Snyder

would require the State to prove beyond a reasonable doubt that Petitioner would be out of prison before including the free world in her definition of society; (2). Snyder would never consider prison to part of society; and (3). Snyder would hold the State to a higher burden of proof. Petitioner's trial counsel specifically and continuously objected to the State's challenge for cause as to Venireperson Snyder, under all four theories. Following additional voir dire by the Court, the Court made the following findings, and ruling:

> I believe, ...this witness (*sic*) would start an accomplice witness behind other witnesses, would require that the accomplice witness be would require the State,...to have a higher degree of proof of credibility than with other witnesses. I'll sustain the State's challenge...
>
> I did not let the defense talk further to the juror. I also believe, though, that the juror is not qualified on her definition of society. But I'm not making a ruling on that since I think my first ruling takes care of that issue.

After continuing individual voir dire of the venire, a jury was seated, and trial commenced on March 20, 1995. In summary, the State, through accomplice testimony,

contended that Petitioner and the same accomplices took Hall from an area mall in the victim's car, placed him in a ditch face down and shot him twice in the back of the head. Additional testimony stated that the victim's vehicle was later located without the tires, wheels, stereo and speakers. The State further contended that Dallas police officers located tires, with the rims, at a Dallas pawnshop; which were stolen from the victim's vehicle by Petitioner.

Petitioner did not present evidence at the guilt/innocence phase of the trial.

Following a verdict of guilty as to capital murder, the punishment phase began. In its case-in-chief and in its rebuttal testimony, the State produced twenty-nine witnesses. All but two were presented solely to testify to unadjudicated, extraneous offenses which the State contended were committed by Petitioner. The punishment testimony, and exhibits alleged that Petitioner had committed a string of aggravated robberies and another murder. Uncorroborated accomplice testimony was the sole evidence linking Petitioner to the death of Kindra Buckner. The State did not offer any evidence that Petitioner was convicted of these extraneous offenses against the eight other victims. In the original proceeding, Cause No. F93-33522-V, Petitioner's trial counsel filed Motions entitled "Motion to Declare the Texas Capital Sentencing Scheme Unconstitutional and Motion to Preclude Imposition of the Death Penalty", and "Motion to

Determine Constitutionality of 37.071(2)(b)(2) – Parties Charge". By order of the court entered November 7, 1994, the motions were transferred to the new Cause No. F94-03320-V, following mistrial in the original cause. Both motions were denied. Undersigned counsel requested and obtained the transcript and record of this cause, which has since been determined to be incomplete. Copies of the referenced motions are at this time unavailable to Petitioner to cite verbatim in this Petition. The filing of the motions, and resulting orders, however, indicate the specificity and timeliness of the Petitioner's objections.

Following the State's case-in-chief, one witness testified that Petitioner was not a continuing threat to society, and one witness testified as to the psychological evaluation of Petitioner. In further mitigation of punishment, nine character witnesses testified. Petitioner did not testify. Petitioner objected to the charge of the court as to punishment, including the Court's refusal to include an instruction as to accomplice witness testimony. The jury answered Special Issue No. 1, "Yes", and Special Issue No. 2, "No". Petitioner was sentenced to death by lethal injection.

As set forth in Texas Code of Criminal Procedure §37.071(2)(h), Petitioner was allowed an automatic appeal to the Texas Court of Criminal Appeals. By statute, Petitioner was denied consideration of his claims before a separate lower state court of appeals. The trial judgment was upheld

in a 6-3 decision. Petitioner timely filed Petition for Writ of Certiorari.

REASONS FOR GRANTING THE WRIT

The reason for granting this writ is that the Texas Court of Criminal Appeals judgment affirming the judgment of the trial court is contrary, not only to precedent of he Court of Criminal Appeals, but precedent from this Court, and state and federal courts of this and other jurisdictions.

Did the Texas Court of Criminal Appeals promulgate a retroactive rule of jury selection relating to challenges for cause in death penalty cases which denied Petitioner his constitutional rights under the Sixth, Eighth and Fourteenth Amendments to the United States Constitution; and which conflicts with the federal and state rule of law?

In affirming the trial court judgment, the Court of Criminal Appeals held:

> We overrule the holding of *Payton v. State* that a conviction will be reversed when a juror was erroneously excused and the State used all of its peremptory challenges. We return to our previous rule, that the erroneous excusing of a veniremember will call for

> reversal only if the record shows that the error deprived the defendant of a lawfully constituted jury. (Appendix pg. 18)

Payton was a non-capital case, and is not appropriate precedent in any case for establishing jury selection in a death case. See *U.S. v. Prati,* 861 F.2d 82 (5th Cir. 1988). In a detailed analysis of the testimony and ruling regarding the challenge of Venireperson Margaret Snyder, the Court advised that it would uphold the lower court if it was correct under any theory of law, citing *Vuong v. State,* 830 S.W.2d 929, 943 (Tex.Crim. App.), *cert. denied,* 113 S.Ct. 595 (1992); *Romero v. State,* 800 S.W.2d 539, 543 (Tex.Crim. App. 1990).

Article 35.16 of the Texas Code of Criminal Procedure sets forth the permissible grounds for the State to challenge for cause. At trial, the State relied upon four grounds, one of which was granted by the trial judge. The majority states that "In view of the preceding analysis, it is clear that the trial court erred in granting the State's challenge of veniremember Snyder for cause." (Appendix pgs. 11-12).

The Court then determined that under the provisions of Texas Rule of Appellate Procedure 44.2 (a) and (b) it was necessary to determine if an improper challenge for cause constituted constitutional error. (Appendix pg. 12).

The Sixth Amendment to the United States Constitution states: "In all criminal prosecutions the accused shall have a speedy and public trial by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law." The Texas Constitution, under Article 1, Section 10, also states that defendants are afforded a speedy trial by an impartial jury. Interpreting *Witherspoon v. Illinois*, 391 U.S. 510 (1968), the Court holds that no violation of the Sixth Amendment occurred. In holding that there existed no significant difference between the federal and state constitutional provisions, the Court summarily held that since Venireperson Snyder was not excused for a legally impermissible reason, such as race, ethnic background, or sex, no constitutional error occurred. (Appendix pgs. 13-14). Rather, the Court held, it was a mere mistake and therefore not of constitutional dimension. (Appendix pg. 14). The majority relied upon *U.S. v. Prati,* 861 F.2d 82 (5th Cir. 1988) in support of its finding that the wrongful exclusion did not violate Petitioner's Sixth Amendment rights. This holding contradicts the Fifth Circuit Court's direction in footnote six that the case was not to be used as precedent in capital cases, differentiating the harmless-error analysis. *Id.* at FN 6. Furthermore, after determining that *Witherspoon* was limited to legally impermissible reasons such as ethnic background, race and sex; and that those reasons were not applicable in

the instant case; the Court ceased the constitutional inquiry. This distillation of *Witherspoon* did not consider that the holding of *Witherspoon* specifically, clearly and directly held that in a capital case, the wrongful exclusion of an otherwise qualified juror is violative of the U.S. Constitution.

Inasmuch as the majority opinion did not limit its analysis to criminal capital cases, it is of significance that this Court has acknowledged and enforced constitutional protections of this type to civil as well as criminal, noncapital cases. Improper juror exclusion in a criminal case has been specifically held as constitutionally protected, and grounds to invalidate the resulting proceedings. *Batson v. Kentucky,* 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986). Likewise, in a civil proceeding, a party is entitled to protection from improper exclusion of jurors for improper reasons. *Edmonson v. Leesville Concrete Company, Inc.*, 500 U.S. 614, 111 S.Ct. 2077, 114 L.Ed.2d 660 (1991). The above-stated caselaw holds that an equal protection right under the law has been violated when an otherwise qualified juror has been being improperly excluded. The instant case stands for the premise that if the federal and state constitutions protect a veniremember from being excluded solely based upon race; then in fact the same juror has equal protection from being excluded for correctly understanding and applying the law. The veniremember has a constitutional protection to sit on the jury, unless disqualified. Provided the juror has been

qualified, she may be excused only upon the State's exercise of a limited number of peremptory strikes. Veniremember Snyder was found to be qualified by the Court of Criminal Appeals. Logically, then she must be allowed to sit on the jury, unless one party exercised a preemptory strike at the conclusion of individual voir dire. If she is excused, the State has in effect exercised an additional peremptory strike; a strike not available to Petitioner. Therefore, not only has Petitioner been harmed by having fewer strikes available, but Petitioner has standing to complain of Veniremember Snyder's constitutional guarantee to equal protection under the law. *Powers v. Ohio,* 499 U.S. 400, 111 S.Ct. 1364, 113 L.Ed.2d 411 (1991).

The federal cases cited above, and the body of caselaw which follows each, has specifically identified impermissible reasons for exclusion of qualified jurors, and extended to them, the protections of the constitution. Yet, is not a qualified juror that understands and voices allegiance to the law, also entitled to constitutional protection? Of what purpose are state and federal statutes in a Texas capital case, which set forth the definitions and standards of qualified jurors, and the definitions of proper grounds for a challenge for cause, if in fact the law now allows a State challenge for cause, for good cause, bad cause, or no cause, restricted only to race, sex and ethnic background? Has this rule promulgated by the Court of Criminal Appeals, in effect,

stated that in a Texas capital case, the trial court may grant every State challenge for cause, provided it is not based upon race, sex or ethnic background? Doesn't this rule in fact encourage such action? If so, Petitioner maintains that outside of the acknowledged categories of race, sex and ethnic background, there is no longer a significant difference between a qualified and disqualified juror. Petitioner maintains then, that it logically follows, that the rule dispenses with the equal protection guarantees to the venireperson, as well as the due process guarantees to Petitioner. Further, the Court's holding dispenses with generations of caselaw, both state and federal, which define and protect Petitioner's and similarly-situated defendant's right to a fair and impartial jury. Moreover, as the Court has now created a new rule of jury selection that runs contrary to state statute governing jury selection in a capital case, it is significant that the Texas Legislature, in fact, prohibited such rule-making. Tex. Gov't Code Ann. § 22.108(a).

It strains reasoning for the majority to hold that a capital defendant does not have a substantial right to expect a trial judge to follow a non-discretionary legislative mandate in jury selection. More so, it violates the legislative mandate that the Court may not promulgate rules which abridge the substantive rights of the litigant. Tex.Gov't Code Ann. § 22.108 (a). Petitioner's rights under Tex.R.App.Proc. Rule 44.2 were abridged by the new rule promulgated by the Court

wherein it urges and encourages trial courts to liberally grant challenges for cause, regardless of whether or not it is erroneous.

Likewise, when the State is permitted to exclude veniremembers that are qualified to sit, and is not required to exercise peremptory strikes to remove the potential juror from the pool; then the State has been given a green light to seat a "tribunal organized to convict". *Fay v. People of the State of New York,* 332 U.S. 261, 294, 67 S.Ct. 1613, 1630, 91 L.Ed. 2043. See also *Tumey v. State of Ohio,* 273 U.S. 510, 47 S.Ct. 437, 71 L.Ed. 749; *Witherspoon,* supra. Without the constitutional, statutory and judicial safeguards ensuring that each juror is properly qualified, and properly expresses her willingness to hold the State to its proper burden of proof beyond a reasonable doubt, then the jury becomes such a tribunal in violation of Petitioner's constitutional guarantees under the Sixth and Fourteenth Amendments.

The majority opinion did not examine constitutional protections to the potential juror or the Petitioner under the Eighth and Fourteenth amendments. Rather the Court dispensed with a constitutional analysis with the holding that Petitioner had no rights attached to a particular juror, only a right that the jury, when seated, was fair and impartial. (Appendix pg. 18). *Witherspoon* states that the right to a fair and impartial juror was substantial, and that to inflict

death upon a defendant by a jury that excluded otherwise qualified jurors "necessarily undermined the very integrity of the process that decided the Petitioner's fate." Supra, at FN 22, citing *Linkletter v. Walker*, 381 U.S. 618, 639, 85 S.Ct. 1731, 14 L.Ed.2d 601.

In contradiction to the Sixth and Fourteenth amendments, when the majority held that Petitioner was not entitled to this qualified juror, Petitioner was denied fundamental fairness, which touched upon the heart of these guarantees. See *Rochin v. California,* 342 U.S. 165, 72 S.Ct. 205, 96 L.Ed. 183 (1952), *Palko v. Connecticut,* 302 U.S.319, 58 S.Ct. 149, 82 L.Ed. 288 (1937). Inasmuch as this Court has held that a capital case necessitates particular scrutiny to verify that all the processes comport with due process; it is necessary to apply the Fourteenth Amendment to the wrongful exclusion of veniremember Snyder. See *Woodson v. North Carolina,* 428 U.S. 280, 96 S.Ct. 2978, 49 L.Ed.2d 944 (1976).

Due Process of Law under the Fourteenth Amendment dictates that Petitioner be afforded fundamental fairness, throughout the trial process; and that exclusion of otherwise qualified jurors violates the basic requirements of procedural fairness. *Witherspoon,* at FN 20.

Petitioner further suffers denial of due process by the retroactive application of the Court's new rule as to capital case challenges for cause. Specifically, the rule did not exist

when Petitioner's trial counsel were questioning potential jurors. Experienced trial counsel undertook voir dire of the panel in a meticulous and knowledgeable manner, as indicated by the nearly fifty volumes of trial transcript relating to jury selection alone. That counsel, despite preparation and skill, is then rendered ineffective when required to voir dire and select a jury based upon rules not even in existence. Such a situation imposed upon Petitioner violates his right of fundamental fairness and due process under the Fourteenth Amendment, his right to effective assistance of counsel under the Sixth Amendment, and his protection from *ex post facto* laws under Article 1, § 10 of the United States Constitution. These constitutional violations attributable to the retroactive application of the new rule were not addressed by the Court.

Yet the retroactive application of the Court's new rule is of direct consequence to Petitioner. As set forth above, prior to the issuance of this opinion, the law in the State of Texas conformed with federal constitutional, statutory, and case precedent which govern the procedure of jury selection. Not only does the rule invoke the prohibition against *ex post* laws, but also violates the rule-making authority of the Court of Criminal Appeals which prohibits abridgment of a defendant's rights. U.S. Constitution, Art. 1, §10. The same Court, in *Flowers v. State*, 935 S.W.2d 131 (Tex. Cr. App. 1996) held that a defendant's rights were abridged when governed by a new rule of appellate procedure. Even the

majority opinion acknowledges that at the time the error was committed in the trial court, under the state law in effect, Petitioner held reversible ground of error as to jury selection. Yet, the Court summarily applied, retroactively, the new rule of jury selection. Petitioner rights were abridged by a prohibited exercise of rule-making authority. Tex.Gov't.Code Ann.§22.108 (a).

As regards state precedent, the majority opinion wholly disregards its own previous rulings as to challenges for cause in capital cases. *Bell v. State*, 724 S.W.2d 780, 795 (Tex.Cr.App. 1986), *Turner v. State*, 635 S.W.2d 734 (Tex.Cr.App.1982) App. 1982), *Grijalva v. State*, 614 S.W.2d 420 (Tex.Cr.App. 1981). In previous cases, the Court considered as critical the provisions of Texas Code of Criminal Procedure Ann. Art. 35.13. This statute provides a distinct process by which challenges for cause and opportunity for peremptory challenges are heard after voir dire of each individual juror, rather than at the conclusion of voir dire of the entire panel. The State is allowed an unfair advantage when allowed an improper challenge for cause, by effectively allowing an additional peremptory strike. *Grijalva*, supra at 424-425. Such an unfair advantage strikes at the heart of the protections embodied in the Fourteenth Amendment to the United States Constitution, and corresponding due process provisions of the Texas Constitution. Yet in the instant case, the majority holds that this entire line of reasoning is now

unfounded. Moreover, the Court overrules the prior law by citing the procedure employed in non-capital cases. (Appendix pg. 18).

> This assertion is not correct. Challenges for cause go to legal qualifications of jurors, whereas peremptory challenges are used to eliminate jurors who are thought (or felt) to be undesirable on a partisan evaluation. A juror's disqualification is not related to the juror's desirability. It is especially wrong to equate the State's challenge for cause to a peremptory challenge, because the State has the right to challenge disqualified jurors even when their disqualifications might seem to make them favor the State. (Appendix pg. 18).

This line of Texas caselaw specifically and directly addresses proper and improper challenges for cause in a capital case, outlining the constitutional grounds for reversal; yet none are addressed by the majority opinion. In fact, it represents valid law in effect at the time Petitioner voir dired the panel, and upon which Petitioner relied upon at trial, as well as on direct appeal. In neither instance, when Petitioner

objected to the infringement of the constitutional right to an impartial jury as well as to due process, did the court consider the precedent of the cases on point.

This federal and state constitutional right to trial by an impartial jury has been consistently upheld as a critical guarantee of liberty. The guarantee, and thereby the entire amendment, has no value without the safeguard of an *impartial* jury. Prior decisions of the Court of Criminal Appeals recognized and upheld the mandate that the jury as seated be impartial. *Bell v. State,* 724 S.W.2d 780 (Tex.Cr.App. 1986). It is now without question that Snyder was a qualified, proper juror, improperly excused.

Once constitutional error is established, then compliance with Tex.R.App.P. §44.2(a), requires a determination beyond a reasonable doubt that the constitutional error did not contribute to the conviction or punishment. The Court of Criminal Appeals has previously held in criminal cases that the inquiry into a claim of harmless error of this type, would be, at best, unguided speculation. *Warmowski v. State*, 853 S.W.2d 575, 578 (Tex.Cr.App. 1993). Unless the likelihood of harm can be meaningfully estimated, the State cannot satisfy its burden to prove the harmlessness of the error. Id. at 578; *Arnold v. State,* 786 S.W.2d 295, at 298 (Tex. Cr.App. 1990).

The majority opinion, in refusing to acknowledge the constitutional magnitude of the error, did not reach the issue of harmlessness of the error.

Although the issues differ in the above-cited cases, the premise remains the same. It is possible in some instances to make reasonable assessments of "what if?". The instant case, as well as the cited cases, however, require "unguided speculation" as to what veniremember Snyder would have voted, not only during guilt/innocence, but during punishment. That speculation relies critically upon her statements that she would be suspicious of accomplice testimony; an attitude endorsed by Texas statutory and caselaw, as well as this Court of Criminal Appeals in the underlying majority opinion. Tex.Code Crim. Proc. Ann. 38.14.

As a criminal, particularly capital, case requires unanimous vote of all 12 jurors, it is impossible to reasonably or accurately state how Margaret Snyder would have viewed the evidence and would have voted. Therefore, the error here defies analysis of harmlessness. The burden is upon the State to establish harmlessness, which is an impossible burden, inasmuch as it is impossible to know or surmise what Snyder's vote would have been if she had been properly seated on the jury. It is one of those instances where one can only speculate as to whether a different result would have occurred. Speculation does not and can not rise to the

level of proof beyond a reasonable doubt, particularly in a capital criminal case. The State's inability to meet the burden results in a showing of harm, and thereby necessitates reversal.

After the Court summarily dismissed Petitioner's claim to constitutional error the Court addressed whether the impermissible exclusion of Snyder affected Petitioner's substantial rights, as dictated by Tex.R.App.Proc.44.2 (b) and *Johnson v. State,* 967 S.W.2d 410, 419 (Tex.Cr.App. 1998); See Fed.R.Crim.Proc. 52(a). As pointed out in the dissenting opinion of Justice Meyers, however, the analysis of "substantial rights" tracks an analysis of "constitutional rights", in that the analysis of the harmlessness of the error directly relates to the question of whether Petitioner rights to a fair and impartial jury were violated. In fact, the analysis of substantial rights tracks an analysis of Petitioner's constitutional rights.

After referring to the similar language of the federal rules of procedure, the Court relies upon *United States v. Cornell,* 25 F.Cas. 650, 656 (D.R.I. 1820)(No. 14,868), for the proposition that incorrect exclusions of juror do not require reversal. In fact *Cornell,* as pre-*Witherspoon* and pre-*Witt,* stood for the proposition that a Quaker could be excluded for having "peculiar opinions" on capital punishment. In light of subsequent, current caselaw following the mandates of *Witherspoon,* the validity of *Cornell* today would be

questionable. The Court then proceeds to compare rulings in jury selection from non-capital state and federal cases, including civil cases. The Court follows this reasoning despite the clear distinction of the selection processes as mandated by Tex.Code Cr.Proc.Ann. §35.13 and §35.25.

Substantial rights were defined by the Court as being affected when the error has a substantial or injurious effect or influence in determining the jury's verdict. *King v. State*, 953 S.W.2d 266, 271 (Tex.Cr.App. 1997). The Court upheld the conviction in *King* due to overwhelming evidence of future dangerousness at punishment which was properly admitted, and thus obliterated the effect of the improperly admitted evidence. *King,* at 273. The *King* decision did not rest upon or reflect the issue of jury selection.

The opinion issued in *King* relied upon the Court's opinion in *Kotteakos v. U.S.,* 328 U.S. 750, 776 (1946). Therein this Court stated:

> ...if one cannot say, with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error, it is impossible to conclude that substantial rights were not affected. ...It is rather, even so, whether the

error had substantial influence. If so, or if one is left in grave doubt, the conviction cannot stand. *Id.* 764-65.

As this Court stated, shortly before the issuance of the opinion in the instant case, the Court of Criminal Appeals appeared to have adopted the test of "fair assurance" that non-constitutional error did not affect, or had a slight effect on the verdict of the jury. *Johnson v. State,* 967 S.W.2d 410 (Tex.Cr.App. 1998). The majority did not refer to "fair assurance" in assessing harm under 44.2(b), nor the holding in *Johnson.*

Finally, the majority cites to and overrules *Payton v. State*, 572 S.W.2d 677 (Tex.Crim.App. 1978) another non-capital case, although the Court has held that due to the fundamental differences in procedure, that the rules of jury selection in a non-capital case cannot be applied to a capital case. *Grijalva v. State,* 614 S.W.2d 420 (Tex.Crim.App. 1981). Moreover, the Court cites *Lawson v. State,* 148 S.W. 587 (1912), a case never cited in a published opinion until issuance of the instant opinion, with questionable precedential value, inasmuch as it is cited for the proposition that Petitioner has no grounds to complain since no objectionable juror was forced on Petitioner. *Lawson*, at 588; See *Witherspoon v. Illinois*, 391 U.S. 510 (1968). The Court

goes on to hold that a defendant is not entitled to have any one juror serve, and that the substantial rights of a defendant are not attached to any excused juror, only to seated jurors.

QUESTION NUMBER 2:

Do the Fourteenth Amendment to the United States Constitution guarantees to equal protection and due process under the law render Texas Code of Criminal Procedure 37.071(2)(b) unconstitutional for allowing Petitioner to be sentenced to death based upon the admission of evidence otherwise illegal and inadmissible in all other criminal trials?

Whether or not it is proper to introduce evidence of unadjudicated extraneous offenses at the punishment hearing of a capital defendant is an issue not uniformly treated throughout the state courts. See, *Burks v. State,* 876 S.W. 2d 877, rehearing denied, cert. den. 115 S.Ct. 909, 513 U.S. 1114, 130 L.Ed.2d 791; (Cr.App. 1994) *State v. Bobo*, 727 S.W.2d 945, (Tenn. 1987), cert. den. 484 U.S. 872, 108 S.Ct. 204, 98 L.Ed. 2d 155; *State v. McCormick*, 272 Ind. 272, 397 NE.2d 276 (1979); *Cook v. State*, 369 So.2d 1251 (Ala. 1978); *State v. Skipper*, 285 S.C. 42, 328 S.E.2d 58 (1985), rev'd on other grounds, 476 U.S. 1, 106 S.Ct. 1669, 90 L.Ed.

2d 1 (1986). *Fair v. State*, 245 Ga. 868, 268 S.E.2d 316, cert.den. 449 U.S. 986, 101 S.Ct. 407, 66 L.Ed.2d 250 (1980).

Whether or not the admission of extraneous, unadjudicated offenses in the punishment phase of a capital trial is violative of the Eighth and Fourteenth Amendments is an issue as yet unresolved by this Court. Moreover, the disparate treatment of such defendants in Texas, wherein non-capital defendants are offered the protections of the law from consideration of such inherently suspect evidence; yet when the stakes, go up, the protections diminish. See Tex. Code Crim. Proc. 37.071.

The mere fact that such evidence is prohibited in noncapital cases is demonstrative of the weaknesses of such evidence. In various issues, this Court has required scrutiny in capital cases to insure the validity of the processes, "there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case." *Woodson v. North Carolina*, 428 U.S. 280, 96 S.Ct. 2978, 49 L.Ed.2d 944 (1976). In light of Texas Rules of Evidence which prohibit the evidence at all non-capital cases, the reliability of such evidence has already been questioned by the legislature. The risk of the introduction of such evidence, recognized in other state jurisdictions, is that the jury base a death sentence upon the commission of acts not proven to have been committed by the defendant. *See State v. Bobo,* supra at 952-953. Some states maintain that if it is

necessary that the sentencing jury find defendant committed such other crimes beyond a reasonable doubt, in order to satisfy the constitutional requirements, then it must be done in a separate hearing or trial prior to introduction of the testimony. For that reason, then the sentencing jury may only hear, and only consider prior convictions of the accused. See *Cook v. State*, supra at 1257.

Inasmuch as this Court has recognized that capital cases require particular scrutiny as to the procedural rules, then the reliability of evidence permitted at sentencing is a scrutiny which should be examined by this Court. See Ake v. Oklahoma, 470 U.S. 68, 105 S.Ct. 1987, 84 L.Ed.2d 53 (1985).

Moreover, the sentencing statute in Texas allows the capital defendant to be faced with a far more difficult burden than any other criminal defendant. Once Petitioner's life is at stake, then the statute allows a reduction of protections. In the instant case, the jury at punishment heard three day of testimony describing eight incidents of violence and terror. In no incident had Petitioner faced a court on such charges. In fact, one incident, the murder of Kindra Buckner, was presented solely though the uncorroborated accomplice testimony of Jamoan Martin. As Martin was under indictment for the same offense at the time he testified, he was an accomplice as a matter of law. *Villareal v. State*, 576 S.W.2d

51 (Tex.Crim.App.), cert. den. 100 S.Ct. 176 (1978). Tex.C.Cr.Proc. Article 3814.

Inasmuch as the State presented no other type of evidence at punishment, it is clear that the jury based their answer to Special Issue #1 based upon testimony of the unadjudicated and extraneous offenses. It is just such evidence that encourages an imposition of death "...imposed out of whim, passion, prejudice, or mistake." See, *Eddings v. Oklahoma*, 455 U.S. 104, 118, 102 S.Ct. 869, 878, 71 Led.2d 1 (1982).

The State insists that the unequal treatment of defendants, and lesser procedural safeguards of the capital defendant is based upon "a strong interest in ensuring that all relevant evidence is place before the jury". *Williams v. Lynaugh,* 814 F.2d, 205, 208 (Fifth Cir. 1987). Volumes of Federal and State Rules of Evidence, and volumes of treatises wrestle with the notions of which relevant evidence is admissible evidence. The mere fact that evidence is relevant has been long recognized as insufficient alone to overcome limitations and prohibitions against admission.

Petitioner prays only that he be afforded the same procedural protections long afforded to every person accused of a misdemeanor or noncapital felony offense in the State of Texas. Eighth and Fourteenth Amendments to the United States Constitution.

CONCLUSION

This new rule of law governing jury selection in capital cases has issued despite the Code of Criminal Procedure, as well as the line of federal and state cases flowing from *Witherspoon* that dictate that a defendant has substantial rights as to improperly excluded jurors. Moreover, in assessing substantial rights, the majority specifically strikes down the line of reasoning that an erroneous exclusion which benefits the State, thereby grants the State an additional peremptory challenge. The Court takes this position without regard to the individual nature of capital voir dire and exercise of challenges and strikes.

The Court then announced what it considers the desirable policy for all courts to adopt: "the liberal granting of challenges for cause." (Appendix pg. 18).

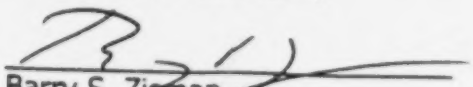
In issuing this new policy, the Court does not address it's effect on *Bell and Grijalva,* which unlike the caselaw cited by the majority, represents precedent as to improper granting of State's challenges for cause in a capital case. In all three cases this same state court held that it was reversible error for a judge to erroneously grant a State's challenge for cause in a capital case. In both cases, and cases flowing therefrom, cite to state and federal constitutional provisions, caselaw, and statutes to uphold the reversals.

As indicated by the second question, Petitioner faced a punishment hearing which was primarily a presentation of alleged unadjudicated extraneous offenses. Much of the testimony was uncorroborated accomplice testimony. Without such evidence of unadjudicated offenses, the State would have had no case-in-chief at the punishment trial. It is reasonable, even likely, that the jury returned a "Yes" answer to Special Issue No.1, based upon evidence inadmissible at any trial wherein the maximum punishment was anything less than death. All defendants in the State of Texas benefit from the protections of the Rules of Evidence as to "bad acts", except the Petitioner and similarly situated capital defendants. That disparate treatment and the resulting harm, denied Petitioner is rights under the Fourteenth Amendment, and renders 37.071(s)(b) unconstitutional.

Under the law as promulgated by the instant case, capital defendants in the State of Texas must face the critical phase of jury selection, aligned against a State with permission to request, and a trial judge with permission to grant, unlimited, prohibited challenges for cause. Capital defendants, like Petitioner, will be forced to attempt selection of an impartial jury, substantially, significantly and unconstitutionally hampered by the knowledge that any errors committed by the State or the trial court will be forgiven.

Petitioner prays that based upon the argument this Honorable Court vacate the lower court judgment, and remand this matter for proceedings in accordance with the relief as prayed.

Respectfully submitted,



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CERTIFICATE OF SERVICE

This will certify that three copies each of the foregoing Petition for Writ of Certiorari were mailed to **Patricia Poppoff Noble, Appellate Division, Dallas County District Attorney's Office, 133 N. Industrial Blvd., Dallas, Texas 75207** and to **Matthew Paul, State's Attorney, 209 W. 14th Street, Room 202, Austin, Texas 78711,** on this the 5th day of June, 1999, by proper delivery, postage prepaid in a depository of the United States Postal Service.

Barry S. Zisman

APPENDIX

Jones v. State, 982 S.W.2d 386 (Tex.Crim.App. 1998)

Page number references to this underlying case are cited to the Appendix page numbers.

.....A1 – A38

982 S.W.2d 386
(Cite as: 982 S.W.2d 386)

George Alarick JONES, Appellant,
v.
The STATE of Texas.

No. 72135.

Court of Criminal Appeals of Texas,
En Banc.

Sept. 16, 1998.

Defendant was convicted in the 292nd District Court, Dallas County, Mike Keasler, J., of capital murder, and he appealed. The Court of Criminal Appeals, Mansfield, J., held that: (1) trial court should have not granted state's motion to remove juror for cause; (2) error in removing juror for cause was not of constitutional magnitude; (3) error in removing juror for cause was harmless; (4) photograph depicting damage to victim's head was admissible as more probative than prejudicial; and (5) accomplice witness rule did not apply to testimony offered to prove extraneous offenses at the punishment stage of a capital murder trial.

Affirmed.

Meyer, J., and Baird, J., dissented in separate opinions.

[1] JURY k107
230k107
Trial court should not have granted state's motion to remove for cause juror who stated that she would be skeptical of accomplice testimony, where juror also stated that her acceptance of accomplice testimony would be dependent on whether or not she believed the individual.

[2] JURY k85

230k85
To show error in the trial court's grant of the state's challenge of a veniremember for cause, appellant must demonstrate one of two things: (1) the trial judge applied the wrong legal standard in sustaining the challenge, or (2) the trial judge abused his discretion in applying the correct legal standard.

[3] CRIMINAL LAW k1134(6)
110k1134(6)
Appellate court must uphold the trial court's decision if it was correct under any theory of law applicable to the case, even if the trial court gave an incorrect reason for its decision.

[4] CRIMINAL LAW k508(9)
110k508(9)
Accomplice witness testimony is inherently suspect. Vernon's Ann.Texas C.C.P. art. 38.14.

[5] JURY k104.1
230k104.1
The state should have explained to juror that when a word was not defined in a statute, she was to give the term the meaning that was ordinarily acceptable in common language, regardless of what the state proved at trial, and thus, trial court should not have dismissed juror for cause on the basis of her views regarding the meaning of the term "society." Vernon's Ann.Texas C.C.P. arts. 3.01, 35.16(b), par. 3.

[6] JURY k131(8)
230k131(8)
Before a veniremember can be properly challenged, the law must be explained to him and he must be asked whether he can follow that law regardless of his personal views. Vernon's Ann.Texas C.C.P. art. 35.16(b), par. 3.

[7] JURY k107
230k107
Trial court should not have dismissed juror for cause on grounds that she would hold the state to a standard of proof higher than

beyond a reasonable doubt; initially, juror stated that she would hold the state to a higher standard, but once the legal definition of reasonable doubt was explained to her, juror was unwavering in stating that she would follow the law and hold the state only to that standard at both stages of trial.

[8] JURY k33(2.15)
230k33(2.15)
Error in granting state's motion dismissing juror for cause was not of constitutional magnitude; juror was not erroneously excused because of general opposition to the death penalty, defendant's right to a speedy public trial by an impartial jury was not violated, and juror was not dismissed for impermissible reason such as race, sex, or ethnicity. U.S.C.A. Const.Amend. 6; Vernon's Ann.Texas Const. Art. 1, ? 10.

[8] JURY k33(5.10)
230k33(5.10)
Error in granting state's motion dismissing juror for cause was not of constitutional magnitude; juror was not erroneously excused because of general opposition to the death penalty, defendant's right to a speedy public trial by an impartial jury was not violated, and juror was not dismissed for impermissible reason such as race, sex, or ethnicity. U.S.C.A. Const.Amend. 6; Vernon's Ann.Texas Const. Art. 1, ? 10.

[8] JURY k108
230k108
Error in granting state's motion dismissing juror for cause was not of constitutional magnitude; juror was not erroneously excused because of general opposition to the death penalty, defendant's right to a speedy public trial by an impartial jury was not violated, and juror was not dismissed for impermissible reason such as race, sex, or ethnicity. U.S.C.A. Const.Amend. 6; Vernon's Ann.Texas Const. Art. 1, ? 10.

[9] JURY k33(1)
230k33(1)
Constitutional provisions bear on the selection of a jury for the trial

of a criminal case.

[10] JURY k33(2.10)
230k33(2.10)
The constitutional right to trial by an impartial jury is not violated by every error in the selection of a jury.

[11] JURY k33(2.15)
230k33(2.15)
Only in very limited circumstances, when a juror is erroneously excused because of general opposition to the death penalty, does the exclusion of a juror by an unintentional mistake amount to a constitutional violation.

[12] JURY k33(2.10)
230k33(2.10)
State does not have the authority to provide greater protections to criminal defendants than those provided in the federal constitution as to trial by an impartial jury in criminal cases. U.S.C.A. Const.Amend. 6; Vernon's Ann.Texas Const. Art. 1, ? 10.

[13] JURY k33(2.10)
230k33(2.10)
A mere error in ruling on a challenge for cause does not violate a defendant's right to a speedy public trial by an impartial jury. Vernon's Ann.Texas Const. Art. 1, ? 10.

[14] CRIMINAL LAW k1166.17
110k1166.17
Error in granting the state's challenge for cause did not affect defendant's substantial rights, and thus, was harmless, where defendant failed to show that he was denied a trial by a fair and impartial jury. Rules App.Proc., Rule 44.2(b).

[15] CRIMINAL LAW k1166.17
110k1166.17
Even though a challenge for cause was improperly sustained, no reversible error is presented unless appellant can show he was denied a trial by a fair and impartial jury.

[16] CRIMINAL LAW k1166.17
110k1166.17
The erroneous excusing of a veniremember will call for reversal only if the record shows that the error deprived defendant of a lawfully constituted jury.

[17] CRIMINAL LAW k438(7)
110k438(7)
Photograph depicting damage to victim's head was admissible as more probative than prejudicial in capital murder case, where photograph depicted no more than the gruesome nature of the injuries inflicted by defendant. Rules of Crim.Evid., Rule 403 (Repealed).

[18] CRIMINAL LAW k438(7)
110k438(7)
Once a defendant objects to photographic evidence on the basis of prejudice, confusion or waste of time, the trial court must weigh its probative value against its potential for unfair prejudice. Rules of Crim.Evid., Rule 403 (Repealed).

[19] CRIMINAL LAW k1153(1)
110k1153(1)
An appellate court reviewing trial court's decision to admit relevant evidence may reverse only for an abuse of discretion, i.e., only when the trial court's decision was outside the zone of reasonable disagreement.

[20] CRIMINAL LAW k438(7)
110k438(7)
Although a crime scene photograph may be gruesome, that fact alone will rarely render the photograph necessarily inadmissible on the basis of prejudice, confusion or waste of time. Rules of Crim.Evid., Rule 403 (Repealed).

[21] CRIMINAL LAW k1045
110k1045
Defendant failed to preserve for appeal issue of whether trial court

in capital murder case should have articulated the factors it considered when overruling his objection to the admission of photographic evidence on the basis of prejudice, confusion or waste of time, where defendant did not ask the trial court to do so and did not object when the trial court failed to do so. Rules of Crim.Evid., Rule 403 (Repealed).

[22] HOMICIDE k358(1)
203k358(1)
The accomplice witness rule did not apply to testimony offered to prove extraneous offenses at the punishment stage of a capital murder trial, and thus, trial court was not required to give an instruction to the jury on the accomplice witness testimony such as the one given in the charge on guilt or innocence. Vernon's Ann.Texas C.C.P. art. 38.14.
***388** Richard Anderson, Dallas, for appellant.

Patricia Poppoff Noble, Asst. Dist. Atty., Dallas, Matthew Paul, State's Atty., Austin, for the State.

Before the court en banc.

OPINION

MANSFIELD, Judge, delivered the opinion of the Court, in which McCORMICK, Presiding Judge, and KELLER, HOLLAND, and WOMACK, Judges, joined.

On March 22, 1995, a Dallas County jury found appellant, George Alarick Jones, guilty of the April 13, 1993, capital murder of Forest J. Hall. [FN1] See Tex. Penal Code ? 19.03(a)(2). At the punishment stage of trial, the jury answered the special issues in such a manner as to require the trial court to sentence appellant to death. See Article 37.071, ? 2(b), (e), & (g). [FN2] Direct appeal to this Court was required by law. See Article 37.071, ? 2(h). Appellant now brings eight points of error in his brief to this Court. We will affirm the judgment of the trial court. [FN3]

FN1. The evidence adduced at the guilt/innocence

stage of trial, viewed in the light most favorable to the jury's verdict, established that appellant, who was then 19 years old, kidnapped Hall from a shopping center parking lot in Dallas County, that appellant transported Hall in Hall's own car to a rural part of Dallas County, and that appellant then shot Hall twice in the back of the head with a .380 caliber automatic handgun. Appellant does not contest the sufficiency of the evidence to support the verdict at either the guilt/innocence or punishment stages of trial.

FN2. All references to articles are to those in the Texas Code of Criminal Procedure.

FN3. The author of this opinion wishes to acknowledge the kind assistance of Womack, J., in the drafting of the discussion of points of error numbers one and two.

[1] In his first and second points of error, appellant argues that the trial court erred in granting, over his objection, the State's challenge of veniremember Snyder for cause. Appellant argues that the State did not carry its burden of establishing that the challenge was proper under Article 35.16. The record reflects that the State, without citing any particular provision of Article 35.16, challenged Snyder under four different theories but that the trial court granted the challenge under only one of those theories, to wit: that Snyder would, in the words of the trial court, "start an accomplice witness behind other witnesses" with respect to credibility.

[2][3] To show error in the trial court's grant of the State's challenge of Snyder for cause, appellant "must demonstrate one of two things: (1) the trial judge applied the wrong legal standard in sustaining the challenge, or (2) the trial judge abused [his] discretion in applying the correct legal standard." Vuong v. State, 830 S.W.2d 929, 943 (Tex.Crim.App.), cert. denied, 506 U.S. 997, ***389** 113 S.Ct. 595, 121 L.Ed.2d 533 (1992). As an appellate court, we must uphold the trial court's decision if it was correct under any theory of law applicable to the case, even if the trial court gave an incorrect reason for its decision. Romero v. State, 800 S.W. 2d 539, 543 (Tex.Crim.App.1990).

The first theory that the State offered to the trial court in support of its challenge of Snyder was that "[t]his woman will never, ever give an accomplice's testimony the same weight and credibility that she will [give] other testimony." Appellant responded that Snyder had "only indicated that she would be skeptical" of an accomplice witness, "[b]ut that if she believed that person, she would give credence to their testimony." As noted previously, the trial court granted the State's challenge under this theory.

The record reflects that, during voir dire, the State informed Snyder that an "accomplice" was someone "who may have participated in the crime themselves or ... were there during the commission of the crime." Subsequently, the State, defense counsel, and the trial court all asked Snyder how she would view accomplice witness testimony. Snyder stated repeatedly, without equivocation or vacillation, that she would be more skeptical of an accomplice witness than of witnesses generally because she would always wonder about the accomplice's motivation for testifying. She also stated, however, that she could accept an accomplice's testimony, explaining that "it would just come down to whether or not I believed the individual."

[4] In Hernandez v. State, 563 S.W.2d 947, 950 (Tex.Crim.App.1978), we held that a veniremember was challengeable for cause under Article 35.16(a)(8), for having a bias or prejudice in favor of or against the defendant, if the veniremember could not "impartially judge the credibility of the witnesses." [FN4] In that case, the veniremember stated that she would always believe police officers who testified at trial. Our holding in Hernandez, however, must not be interpreted to mean that a veniremember is challengeable for cause simply because he would be more skeptical of a certain category of witness than of witnesses generally. What we meant in Hernandez was that litigants are entitled to jurors who will be genuinely open-minded and persuadable, with no extreme or absolute positions regarding the credibility of any witness. We could not have meant that jurors must be completely impartial and free of any trace of skepticism toward any category of witness. Complete impartiality cannot be realized as long as human beings are called upon to be jurors. No

person sitting as a juror can completely remove his own experiences, beliefs, and values, however hard he may try. Thus, Snyder was not challengeable for cause simply because she stated she would be more skeptical of accomplice witnesses than of witnesses generally. [FN5] She expressed no extreme or absolute position regarding the credibility of accomplice witnesses. In short, in granting the State's challenge for cause under the State's first theory, the trial court applied the wrong legal standard.

FN4. Article 35.16(a)(8) has since been renumbered as Article 35.16(a)(9).

FN5. Indeed, Snyder's position was logical, given that accomplice witness testimony is inherently suspect. See Gill v. State, 873 S.W.2d 45, 48 (Tex.Crim.App.1994); Walker v. State, 615 S.W.2d 728, 731 (Tex.Crim.App.1981); Tex.Code Crim. Proc. art. 38.14.

The State argues that Snyder was challengeable for cause under our holding in May v. State, 738 S.W.2d 261, 270-271 (Tex.Crim.App.), cert. denied, 484 U.S. 872, 108 S.Ct. 206, 98 L.Ed.2d 158 (1987). The State's reliance on May is misplaced, however. In that capital murder case, we held that a veniremember was challengeable under Article 35.16(b)(3), for having a bias or prejudice against a phase of the law upon which the State was entitled to rely, when she stated that she would always disregard an accomplice witness' testimony at the punishment stage of trial and would answer the special issues in such a manner that the defendant would receive a life sentence. Thus, May is easily distinguishable from the case at bar.

[5] The second theory that the State offered to the trial court in support of its ***390** challenge of Snyder was that "she is going to require [the State to] prove beyond a reasonable doubt that a person is actually going to be outside the penitentiary before she is ever going to consider [the non-prison segment of society] to be a part of 'society' [for the purposes] of [punishment] question number one." See Article 37.071, ? 2(b). Appellant responded that "[a]ll that [Snyder] is requiring is [for] the State [to] meet its burden of

proof."

The record reflects that, in response to a leading question from the State, Snyder stated that it would be "reasonable" for a juror to require the State to prove beyond a reasonable doubt that the defendant would actually be out of prison at a certain time before that juror would consider the non-prison population to be part of "society" for the purposes of the first punishment issue. The State now argues that Snyder's answer rendered her challengeable under Article 35.16(b)(3).

[6] Before a veniremember can be properly challenged under Article 35.16(b)(3), the law must be explained to him and he must be asked whether he can follow that law regardless of his personal views. Chambers v. State, 903 S.W.2d 21, 29 (Tex.Crim.App.1995). Here, no one explained to Snyder the law regarding the term "society" as used in the first punishment issue. The State should have explained to Snyder that the term "society" was not defined by statute and that, therefore, under Article 3.01, jurors must give the term the meaning that is ordinarily acceptable in common language, regardless of what the State proves at trial. Camacho v. State, 864 S.W.2d 524, 536 (Tex.Crim.App.1993), cert. denied, 510 U.S. 1215, 114 S.Ct. 1339, 127 L.Ed.2d 687 (1994); Rougeau v. State, 738 S.W.2d 651, 660 (Tex.Crim.App.1987), cert. denied, 485 U.S. 1029, 108 S.Ct. 1586, 99 L.Ed.2d 901 (1988). Because the relevant law was not explained to Snyder, she was not challengeable under the State's second theory.

The third theory that the State offered to the trial court in support of its challenge of Snyder was that she would "never consider prison to be part of 'society' " for the purposes of the first punishment issue. [FN6] Appellant responded that Snyder was not challengeable on the basis of her views regarding the meaning of "society" because no one had explained to her the law regarding that term.

FN6. Contrast this with the State's second theory.

The record reflects that, in response to a question from the trial

court, Snyder stated that she would exclude the prison population from her definition of "society" when answering the first punishment issue. The State now argues that her statement rendered her challengeable under Article 35.16(b)(3). As we noted previously, however, no one ever explained to Snyder the law regarding the meaning of the term "society." Therefore, she was not challengeable under the State's third theory, either.

[7] The fourth and final theory that the State offered to the trial court in support of its challenge of Snyder was that "this juror is going to impose a higher burden of proof on the State of Texas from the get-go" at both stages of trial. Appellant responded that "once they showed her what the law is, she said that she could follow the law." The trial court then expressly ruled against the State on this theory.

The record reflects that, initially, Snyder stated that she would hold the State to a standard of proof higher than beyond a reasonable doubt. However, once the legal definition of "reasonable doubt" was explained to her, [FN7] Snyder was unwavering in stating that she would follow the law and hold the State only to that standard at both stages of trial. On this record, therefore, we cannot say that the trial court abused its discretion in refusing to grant the State's challenge under its fourth theory.

FN7. See Geesa v. State, 820 S.W.2d 154, 162 (Tex.Crim.App.1991).

[8] In view of the preceding analysis, it is clear that the trial court erred in granting the State's challenge of veniremember Snyder for cause. The next question is whether the judgment should be reversed because of the error. We must first decide whether the error is constitutional or otherwise, because ***391** the standard of review for errors of constitutional dimension is different from the standard for other errors. See Tex.R.App. Proc. 44.2. [FN8]

FN8. Texas Rule of Appellate Procedure 44.2 provides in relevant part:

(a) Constitutional error. If the appellate record in a

criminal case reveals constitutional error that is subject to harmless error review, the court of appeals must reverse a judgment of conviction or punishment unless the court determines beyond a reasonable doubt that the error did not contribute to the conviction or punishment.

(b) Other errors. Any other error, defect, irregularity, or variance that does not affect substantial rights must be disregarded.

[9][10][11] Constitutional provisions bear on the selection of a jury for the trial of a criminal case. The Sixth Amendment to the United States Constitution states: "In all criminal prosecutions the accused shall have a speedy and public trial by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law." The right embodied in this clause of the Sixth Amendment is one that, under the Due Process Clause of the Fourteenth Amendment, states may not deny. Duncan v. Louisiana, 391 U.S. 145, 88 S.Ct. 1444, 20 L.Ed.2d 491 (1968). But the constitutional right to trial by an impartial jury is not violated by every error in the selection of a jury.

Moreover, while it is true, as appellant argues, that the Constitution guarantees to an accused the right to a speedy trial by an impartial jury, it does not follow that the rejection of [allegedly] unqualified persons for insufficient cause would deprive appellant of that right; or that any useful or legitimate purpose would be served by remanding the case for a new trial before another impartial jury. It is significant in this respect, moreover, that no claim is made that the jury, as finally constituted, was biased or prejudiced; or that appellant was deprived of a trial by an impartial jury.

Shettel v. United States, 113 F.2d 34, 36 (D.C.Cir.1940). Only in very limited circumstances, when a juror is erroneously excused because of general opposition to the death penalty ("Witherspoon " error), [FN9] does the exclusion of a juror by an unintentional mistake amount to a constitutional violation. United States v. Prati, 861 F.2d 82, 87 (5th Cir.1988). Accord, United States v. Gonzalez-Balderas, 11 F.3d 1218, 1222 (5th Cir.), cert. denied, 511 U.S. 1129, 114 S.Ct. 2138, 128 L.Ed.2d 867 (1994). Cf. Ross v. Oklahoma, 487 U.S. 81, 108 S.Ct. 2273, 101 L.Ed.2d 80 (1988) (erroneous denial of defendant's challenge for cause which resulted

in loss of peremptory challenge in capital case did not violate constitutional right to impartial jury). Although this is a capital case, the juror was not excused because of her opposition to the death penalty. There was no violation of the Sixth Amendment right.

FN9. Witherspoon v. Illinois, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968).

[12][13] The people of Texas have the authority to provide greater protections to criminal defendants than those provided in the federal constitution. But as to trial by an impartial jury in criminal cases, they have not. Like its federal counterpart, the Bill of Rights in the Texas Constitution recognizes the right to trial by jury. "In all criminal prosecutions the accused shall have a speedy public trial by an impartial jury." Tex. Const. art. I, ? 10. As we have said previously, there is no significant textual difference between the two constitutional provisions which would indicate that different standards of protection should be applied, and we can conceive of no reason why the impartial-jury requirements in the two constitutions should be different. Marquez v. State, 725 S.W.2d 217, 243 (Tex.Crim.App.1987). A mere error in ruling on a challenge for cause does not violate Article 1, ? 10, of the Texas Constitution.

Exclusion of jurors for impermissible reasons (sucn as race, sex, or ethnicity) may violate other constitutional provisions, but this case involves no such reason. The error in this case was a mistaken application of Article 35.16(b)(3). It is not of constitutional dimension.

[14] We must therefore disregard the error in granting the State's challenge for ***392** cause unless it affected substantial rights. See Tex.R.App. Proc. 44.2(b); Johnson v. State, 967 S.W.2d 410, 417 (Tex.Crim.App.1998). The standard of review in our rule is substantially identical to that in Federal Rule of Criminal Procedure 52(a). [FN10] See Notes and Comments, Tex.R.App. Proc. 44.2 (1997). Therefore, we first shall consider how the federal courts treat such errors.

FN10. "Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded." Fed. R.Crim. Proc. 52(a).

It was established early in the federal courts that the incorrect exclusion of a juror did not require reversal of a judgment. Chief Justice Story, sitting as a circuit judge, denied a new trial to a defendant who claimed that Quaker jurors had been excused in error. The Chief Justice reasoned, "Even if a juror had been set aside by the court, for an insufficient cause, I do not know that it is a matter of error, if the trial has been by a jury duly sworn and impaneled, and above all exceptions. Neither the prisoner nor the government in such a case have suffered an injury." United States v. Cornell, 25 F.Cas. 650, 656 (D.R.I.1820) (No. 14,868).

The full Court adopted the same reasoning in Northern Pacific R.R. Co. v. Herbert, 116 U.S. 642, 6 S.Ct. 590, 29 L.Ed. 755 (1886), in which a juror had been challenged for cause by Plaintiff Herbert and excused by the trial court. The Supreme Court held that, even if there was no cause to excuse the juror, the ruling "did not prejudice the [defendant] company. A competent and unbiased juror was selected and sworn, and the company had, therefore, a trial by an impartial jury, which was all it could demand." 116 U.S. at 646, 6 S.Ct. 590.

The same holding applies in the trial of criminal cases in federal courts. See, e.g., United States v. Gonzalez-Balderas, 11 F.3d 1218, 1222 (5th Cir.), cert. denied, 511 U.S. 1129, 114 S.Ct. 2138, 128 L.Ed.2d 867 (1994); United States v. Prati, 861 F.2d 82, 87 (5th Cir.1988); Shettel v. United States, 113 F.2d 34, 36 (D.C.Cir.1940).

When we look to the jurisprudence of other jurisdictions, we find only decisions which employ the same principle as that of the federal courts. [FN11] See State v. Walden, 183 Ariz. 595, 905 P.2d 974, 988 (Ariz.1995), cert. denied, 517 U.S. 1146, 116 S.Ct. 1444, 134 L.Ed.2d 564 (1996); People v. Holt, 15 Cal.4th 619, 63 Cal.Rptr.2d 782, 937 P.2d 213 (Cal.1997); Wheeler v. People, 63 Colo. 209, 165 P. 257, 258 (Colo.1917); Wells v. State, 261 Ga.

282, 404 S.E.2d 106, 107 (Ga.1991); State v. Clark, 47 Idaho 750, 278 P. 776, 777-78 (Idaho 1929); State v. Kendall, 200 Iowa 483, 203 N.W. 806, 807 (Iowa 1925); Hunt v. State, 321 Md. 387, 583 A.2d 218, 234 (Md.1990); State v. Hurst, 153 Minn. 525, 193 N.W. 680, 682 (Minn.1922); State v. Hill, 827 S.W.2d 196, 199 (Mo.1992); State v. Huffman, 89 Mont. 194, 296 P. 789, 790 (Mont.1931); Bufford v. State, 148 Neb. 38, 26 N.W.2d 383, 386 (Neb.1947); State v. Martinez, 34 N.M. 112, 278 P. 210, 210-11 (N.M.1929); State v. Carson, 296 N.C. 31, 249 S.E.2d 417, 423 (N.C.1978); State v. Wells, 114 S.C. 151, 103 S.E. 515, 516 (S.C.1920); State v. Larkin, 130 Wash. 531, 228 P. 289, 289 (Wash.1924).

FN11. One state's legislature enacted a contrary rule by statute to abolish the effect of its court's jurisprudence. Compare La.Code Crim. Proc. art. 800 with, e.g., State v. Claire, 41 La. Ann. 1067, 6 So. 806, 806 (1889) (it is established that appellant cannot complain of court's excusing juror).

[15] The law in Texas for civil cases is like that of the federal courts and the courts of the other states. "It has long been the established rule in this state that even though the challenge for cause was improperly sustained, no reversible error is presented unless appellant can show he was denied a trial by a fair and impartial jury." City of Hawkins v. E.B. Germany & Sons, 425 S.W.2d 23, 26 (Tex.Civ.App.--Tyler 1968, writ ref'd n.r.e.). Accord, R. McDonald, 3 Texas Civil Practice in District and County Courts ? 11.11 (1983 rev.). The rule was established more than a century ago. See Couts v. Neer, 70 Tex. 468, 9 S.W. 40 (1888).

For at least sixty-five years, this Court employed an essentially similar doctrine when it confronted a claim that a State's challenge for cause had been erroneously granted. "Whether the court correctly permitted ***393** the state to challenge the jurors for this cause, it is unnecessary for us to decide, because the bills nowhere and in no way show that any objectionable juror was thereby forced upon the appellant. So that, even if the court erred in such a matter, no injury whatever is shown to appellant, and he has no cause to complain because thereof." Lawson v. State, 67

Tex.Crim. 24, 148 S.W. 587, 588 (Tex.Crim.App.1912). Accord, Holmes v. State, 70 Tex.Crim. 423, 157 S.W. 487 (Tex.Crim.App.1913). [FN12] We followed this rule until we delivered our opinion on rehearing in Payton v. State, 572 S.W.2d 677 (Tex.Crim.App.1978), which said:

FN12. The ancestor of this Court, the Court of Appeals, had first decided that there would be reversal for every error without consideration of its effect. "It has been settled by this court that the rulings of the court in organizing a jury are not revisable unless they infringe the law or prejudice the accused. In this case we think the action of the court in setting aside the juror upon the challenge of the district attorney for cause was an infringement upon the law, though it may not have operated to the prejudice of the defendant; and for this error the judgment is reversed and the cause remanded." Wade v. State, 12 Tex.App. 358, 370 (1882) (citations omitted). This early doctrine was abandoned long ago. It is contrary to our policy that almost all errors are subject to harmless-error review. See Cain v. State, 947 S.W.2d 262, 264 (Tex.Crim.App.1997).

What is the harmful effect upon the accused of an erroneous exclusion sua sponte or on challenge for cause by the State? If the prospective juror is not subject to the alleged disqualification, and if the defendant objects to the trial court's erroneous exclusion of the venireman, then the effect, from the perspective of the defendant, is the same as if the State had been given an extra peremptory challenge. On this reasoning, harm would be shown if the State exercised all its peremptory challenges on other veniremen. This test for harm is supported by language in Pearce v. State, Tex.Cr.App., 513 S.W.2d 539, where in addressing a challenge to the trial court's sua sponte dismissal of a venireman this Court wrote:

"There is no showing that the State exhausted its peremptory challenges and that the prospective juror, claimed to have been improperly excused, would have served except for the court's action."

In Culley v. State, Tex.Cr.App, 505 S.W.2d 567, on another challenge to the erroneous exclusion of a prospective juror,

the court wrote:

"There is no showing that appellant did not have a fair and impartial trial, nor that the State had exhausted its peremptory challenges, one of which might have been used to eliminate the prospective juror." (Emphasis added.)

We find this test expressed in Pearce and Culley to be appropriate to the issue before us.

Payton v. State, 572 S.W.2d at 680 (footnote omitted).

The statement that there was a "test expressed in Pearce and Culley " was not justified. Neither of those cases employed, or purported to employ, as a test the fact that the State had not used all its peremptory challenges. The authors simply raised as a point of fact the ability of the State to have excluded the challenged juror. But that ability would not have affected any substantial right of the defendant, because a defendant has no right that any particular individual serve on the jury. The defendant's only substantial right is that the jurors who do serve be qualified. The defendant's rights go to those who serve, not to those who are excused. Before Payton, we recognized that principle, as do the courts of all the other jurisdictions.

A second flaw in the reasoning of Payton is the statement that the effect of the erroneous exclusion "is the same as if the State had been given an extra peremptory challenge." Ibid. This assertion is not correct. Challenges for cause go to legal qualifications of jurors, whereas peremptory challenges are used to eliminate jurors who are thought (or felt) to be undesirable on a partisan evaluation. A juror's disqualification is not related to the juror's desirability. It is especially wrong to equate the State's challenge for cause to a peremptory challenge, because the State has the right to challenge disqualified jurors even when their disqualifications might seem to make them favor the State. ***394** See Morrow v. State, 910 S.W.2d 471 (Tex.Crim.App.1995).

By the standards of stare decisis, analysis of precedent, and logic, the holding of Payton is unsupportable. It is also contrary to a policy which we think courts should follow: the liberal granting of challenges for cause. The venire comprises so many jurors who are

clearly qualified that it is unnecessary to err by denying a challenge for cause on a close question.

[16] We overrule the holding of Payton v. State that a conviction will be reversed when a juror was erroneously excused and the State used all its peremptory challenges. We return to our previous rule, that the erroneous excusing of a veniremember will call for reversal only if the record shows that the error deprived the defendant of a lawfully constituted jury. There being no such showing in this case, points of error one and two are overruled.

In points of error numbers three, four, and five, appellant argues that the trial court erred in "denying [his] requests to voir dire [the venire] and present evidence [at trial] in regard to parole law and for the trial court to charge the jury thereon." Appellant argues further that the trial court's denial of his requests violated his rights under the Sixth Amendment (right to counsel), Eighth Amendment (ban on cruel and unusual punishment), and the Fourteenth Amendment (rights to equal protection of the laws and due process of law).

We have addressed such claims before and have held adversely to appellant. See Rhoades v. State, 934 S.W.2d 113, 118-119 (Tex.Crim.App.1996) (plurality op.); McFarland v. State, 928 S.W.2d 482, 505 (Tex.Crim.App.1996); Lawton v. State, 913 S.W.2d 542, 556 (Tex.Crim.App.1995), cert. denied, 519 U.S. 826, 117 S.Ct. 88, 136 L.Ed.2d 44 (1996); Sonnier v. State, 913 S.W.2d 511, 518, 521 (Tex.Crim.App.1995); Broxton v. State, 909 S.W.2d 912, 918-919 (Tex.Crim.App.1995); Smith v. State, 898 S.W.2d 838, 846-848 (Tex.Crim.App.) (plurality op.), cert. denied, 516 U.S. 843, 116 S.Ct. 131, 133 L.Ed.2d 80 (1995); Willingham v. State, 897 S.W.2d 351, 359 (Tex.Crim.App.1995). We overrule points of error numbers three, four, and five.

[17] In his sixth point of error, appellant complains of the admission in evidence, at the punishment stage, of State's exhibit 37, which was a photograph of Kindra Buckner's face taken after her body was found on September 21, 1993. [FN13] Appellant concedes that the photograph was not without relevance, "because ... it depicts the damage to the victim's head." He "strenuously

contends, however, that any such relevance [was] substantially outweighed by the prejudicial effect of the picture." See Tex.R.Crim. Evid. 403. Appellant insists that the photograph was too gruesome to be admissible.

FN13. See footnote 11 and accompanying text.

The record does not contain the photograph in question, but, in its brief, the State describes the photograph as being an eight-inch by twelve-inch color photograph of Buckner's face taken at the scene of the extraneous offense. According to the State, "[a] large hole appears in the face, [and] the teeth are blown outward to one side." The briefs contain no other information about the photograph.

[18][19] Once a defendant objects to photographic evidence on the basis of Rule 403, the trial court must weigh its probative value against its potential for unfair prejudice. Narvaiz v. State, 840 S.W.2d 415, 429 (Tex.Crim.App.1992), cert. denied, 507 U.S. 975, 113 S.Ct. 1422, 122 L.Ed.2d 791 (1993). An appellate court reviewing the trial court's decision may reverse it only for an abuse of discretion, i.e., only when the trial court's decision was outside the zone of reasonable disagreement. Ibid.

[20] On the record before us, we can discern no abuse of discretion on the part of the trial court in admitting State's exhibit 37. The photograph in question apparently depicted no more than the gruesome nature of the injuries inflicted by appellant and Martin. Although a crime scene photograph may be gruesome, that fact alone will rarely render the photograph necessarily inadmissible under Rule 403. Id. at 430; Long v. State, 823 ***395** S.W.2d 259, 272-273 (Tex.Crim.App.1991), cert. denied, 505 U.S. 1224, 112 S.Ct. 3042, 120 L.Ed.2d 910 (1992). We overrule point of error number six.

[21] In point of error number seven, appellant contends that the trial court erred when it "denied [his] request for a Rule 403 balancing test" with respect to State's exhibit 37. Appellant argues that the trial court should have articulated the factors it considered when overruling his Rule 403 objection, so as to facilitate appellate

review. See Montgomery v. State, 810 S.W.2d 372, 393 n. 4 (Tex.Crim.App.1990) (opinion on reh'g).

The record reflects that the trial court did not explicitly state into the record its mental process in overruling appellant's Rule 403 objection to State's exhibit 37. The record also reflects, however, that appellant did not ask the trial court to do so and did not object when the trial court failed to do so. Any error, therefore, has not been preserved for appellate review. Tex.R.App. Proc. 33.1. We overrule point of error number seven.

[22] In his eighth and final point of error, appellant argues that the trial court erred in overruling his objection to the charge at punishment. Appellant orally objected to the charge "for its failure to give an instruction to the jury on the accomplice witness testimony [of Jamoan Martin] such as the one given in the charge on guilt or innocence." See Article 38.14. The record reflects that, during the punishment stage, Martin testified about an extraneous murder committed by appellant.

Appellant has shown no error. The accomplice witness rule embodied in Article 38.14 does not apply to testimony offered to prove extraneous offenses at the punishment stage of a capital murder trial. Farris v. State, 819 S.W.2d 490, 507 (Tex.Crim.App.1990), cert. denied, 503 U.S. 911, 112 S.Ct. 1278, 117 L.Ed.2d 504 (1992). We overrule point of error number eight.

Having found no reversible error, we affirm the judgment of the trial court.

PRICE, J., concurred in the judgment of the Court.

BAIRD and MEYERS, JJ., delivered dissenting opinions.

OVERSTREET, J., dissented without a written opinion.

BAIRD, Judge, dissenting.

Direct and controlling precedent from this Court mandates reversal when a trial judge erroneously grants a State's challenge for cause in a capital case. Richardson v. State, 744 S.W.2d 65 (Tex.Cr.App.1987); and, Bell v. State, 724 S.W.2d 780 (Tex.Cr.App.1986). However, the majority ignores this clear mandate and, in an act of blatant result-oriented jurisprudence, contorts Tex.R.App. P. ? 44.2 to hold implicitly that there is no constitutional right to an impartial jury and to hold explicitly that a criminal defendant does not have a substantial right to a jury selected pursuant to the legislative scheme prescribed by Tex.Code Crim. Proc. Ann. chapter 35. [FN1] Part I of this opinion discusses why the error herein was constitutional and Part II offers an alternative discussion of why a defendant has a substantial right to a jury selected pursuant to the scheme established by the Legislature.

FN1. Tex.R.App. P. 44.2, Reversible Error in Criminal Cases

(a) Constitutional error. If the appellate record in a criminal case reveals constitutional error that is subject to harmless error review, the court of appeals must reverse a judgment of conviction or punishment unless the court determines beyond a reasonable doubt that the error did not contribute to the conviction or punishment.

(b) Other errors. Any other error, defect, irregularity, or variance that does not affect substantial rights must be disregarded.

I.

A.

The most valuable right guaranteed by our Constitution is the right to trial by an impartial jury. U.S. Const. amend. VI. The value of this right depends upon the impartiality of the jury. Juror qualification is the province of the Legislature. Tex. Const. art. XVI, ? 19. [FN2] To discharge this constitutional mandate, ***396** the Legislature has enacted legislation prescribing juror qualifications and providing challenges for cause and peremptory strikes. See generally, Tex.Code Crim. Proc. Ann. Chapter 35. A jury selected

pursuant to this legislative scheme constitutes an impartial jury under the Sixth Amendment.

FN2. Article XVI, ? 19 of the Texas Constitution provides: "The Legislature shall prescribe by law the qualifications of grand and petit jurors; provided that neither the right nor the duty to serve on grand and petit juries shall be denied or abridged by reason of sex."

However, this constitutionally mandated scheme was breached when the trial judge granted the State's challenge for cause to veniremember Snyder. Because the obvious purpose of the legislative scheme is to ensure an impartial jury, a Sixth Amendment right, the harm analysis for an error which results in a breach of the scheme must be conducted under the constitutional standard of Tex.R.App. P. 44.2(a).

B.

Additionally, by subverting Tex.Code Crim. Proc. Ann. art. 35.16(b)(3), the trial judge violated appellant's due process rights as mandated by the Fourteenth Amendment to the United States Constitution and appellant's due course of law right required by Article 1 ? 19 of the Texas Constitution. Due process is the most comprehensive and least specific of the liberties protected by the Constitutions. See Rochin v. California, 342 U.S. 165, 72 S.Ct. 205, 96 L.Ed. 183 (1952). It is based on fundamental fairness and brings to the individual States the requirement that those States respect beliefs that are "implicit in the concept of ordered liberty." See Palko v. Connecticut, 302 U.S. 319, 325, 58 S.Ct. 149, 152, 82 L.Ed. 288 (1937). The instant case is a capital case; a heightened need for reliability in all processes is required because of the qualitative difference between death and all other punishments. See Woodson v. North Carolina, 428 U.S. 280, 96 S.Ct. 2978, 49 L.Ed.2d 944 (1976). With this heightened need for reliability, the Fourteenth Amendment Due Process issue raised by a trial judged errantly granting a State's challenge for cause in a capital case must be examined.

The United States Supreme Court has declared, in criminal cases, "certainly one of the basic purposes of the Due Process Clause has always been to protect a person against having the Government impose burdens upon him except in accordance with the valid laws of the land." Giaccio v. Pennsylvania, 382 U.S. 399, 86 S.Ct. 518, 15 L.Ed.2d 447 (1966). The Fifth Circuit has recognized that "public officials violate substantive due process rights if they act arbitrarily or capriciously." Fowler v. Smith, 68 F.3d 124 (5th Cir.1995). [FN3]

FN3. This case deals involves the wrongful discharge of a public employee and is not offered as direct criminal precedent, only to show this concept is a recognized part of due process.

The Texas legislature has specifically delineated the requirements for a valid challenge for cause. The trial judge, in the instant case, violated this legislative mandate in granting the State's challenge for cause to veniremember Snyder. By failing to follow the non-discretionary legislative mandate in accepting challenges for cause, the trial court violated due process. [FN4] A trial court may not ignore a non-discretionary law in a critical setting like jury selection for a capital murder trial and still comport with the heightened expectation of fundamental fairness required by the Due Process Clause of the Fourteenth Amendment and Article 1 ? 19 of the Texas Constitution. [FN5]

FN4. This error meets the fundamental fairness aspect of the Fourteenth Amendment because any error in creating the jury encompasses each moment that jury hears evidence or deliberates. Error in composing the jury infects the structure of the trial by exposing all procedure and evidence to an incorrectly selected jury.

FN5. The majority recognizes the issue as 'did this error deny the defendant a Sixth Amendment right to trial by an impartial jury?' The majority answers negatively and moves on while ignoring the Fourteenth Amendment aspects of the question. The majority also relies on U.S. v. Prati, 861 F.2d 82 (5th Cir.1988)

in answering the 6th Amendment question. Ante at 391. Prati is not applicable because it is a non- capital case that uses a harmless-error analysis that the Court notes is not to be used in capital cases. Prati at 87, footnote 6.

C.

Having determined the error is of a constitutional magnitude, a harm analysis review ***397** under Tex.R.App. P. ? 44.2(a) requires a determination "beyond a reasonable doubt that the error did not contribute to the conviction or punishment." I take guidance in determining the applicability of harmless error review from Holloway v. Arkansas, 435 U.S. 475, 98 S.Ct. 1173, 55 L.Ed.2d 426 (1978). Although the instant case and Holloway revolve around different issues, the same principle of analysis applies. In Holloway, the Supreme Court stated:

... In the normal case where a harmless-error rule is applied, the error occurs at trial and its scope is readily identifiable. Accordingly, the reviewing court can undertake with some confidence its relatively narrow task of assessing the likelihood that the error materially affected the deliberations of the jury....But in a case of joint representation of conflicting interests the evil--it bears repeating--is in what the advocate finds himself compelled to refrain from doing....It may be possible in some cases to identify from the record the prejudices resulting from an attorney's failure to undertake certain trial tasks, but even with a record of the sentencing hearing available it would be difficult to judge intelligently the impact of a conflict on the attorney's representation of a client. And to assess the impact of a conflict of interests on the attorney's options, tactics, and decisions in plea negotiations would be virtually impossible. Thus, an inquiry into a claim of harmless error here would require, unlike most cases, unguided speculation. (emphasis in the original)(internal citations omitted).

Id., 435 U.S. at 491, 98 S.Ct. at 1182.

This Court held similarly in Warmowski v. State, 853 S.W.2d 575, 578 (Tex.Cr.App.1993):

The point is well taken that if the nature of an error is such that the record will not provide a basis for estimating its

contribution to conviction or punishment, it does not matter whether we declare the error subject to a harm analysis or not--the result will invariably be the same. As beneficiary of the error, the State has the burden to demonstrate harmlessness. Arnold v. State, 786 S.W.2d 295, at 298 (Tex.Cr.App.1990). On a record from which the likelihood of harm cannot meaningfully be estimated, the State will be unable to satisfy its burden.

This Court cannot hold the instant error was harmless without engaging in "unguided speculation." No judge on this Court can produce a clear and substantiated view of how venireperson Snyder would have assessed the evidence or voted on the punishment issues in appellant's capital trial. [FN6] The lack of opportunity to assess harm arising from this error is inherent in the error itself; no one can say with assurance what might have happened had veniremember Snyder not been improperly excused. This error is an error of constitutional magnitude, that involves the framework of the trial and defies harmless error analysis. [FN7] The law requires the conviction be reversed and the case remanded to the trial court.

FN6. Here I draw attention to the statutory requirement of unanimity before the death penalty can be imposed. Our law requires that all twelve jurors answer the special issues in favor of death. We cannot assume because twelve others answered in favor of death that Snyder too would have answered as such.

FN7. See Twine v. State, 970 S.W.2d. 18, (Tex.Cr.App.1998)(BAIRD, J., dissenting), for another discussion of why harmless-error analysis cannot be undertaken in reference to an error whose consequence is not captured by the record. In Twine, this court attempted a harm analysis based on the trial judge's denying defense the opportunity to make a timely opening statement.

II.
A.

The majority declares this error is not "of constitutional dimension,"

and attempts to perform an analysis of this error under Tex.R.App. P. 44.2(b). Ante at 391. They begin their analysis by drawing a parallel between Tex.R.App. P. 44.2(b) and the Federal Rules of Criminal Procedure 52(a). Ante at 392. The majority attempts to analyze pertinent federal and state law and its applicability to the case sub judice. Ante at 392. The findings of other jurisdictions' criminal law are reinforced by looking to Texas civil law regarding the question of the instant case. Ante at 392. The majority ends by incorrectly ***398** referring to Lawson v. State, 67 Tex.Cr. 24, 148 S.W. 587 (1912), [FN8] and to Payton v, State, 572 S.W.2d 677 (Tex.Cr.App.1978). Ante at 393.

FN8. Lawson has never been cited by any court as authority.

Neither Lawson, nor Payton, have bearing on the instant issue. Lawson is an ancient case from 1912 that has been overruled and Payton, decided in 1978, gives a rule for non-capital cases that does not apply to capital cases. [FN9] By 1986, this court had adopted the following rule in capital cases: In capital murder cases, if the trial court improperly sustains a State's challenge for cause and excludes a qualified juror, over a defendant's objection, reversible error arises regardless of whether the State has exhausted its peremptory challenges. This is because peremptory strikes are exercised after each prospective juror is questioned, under Tex.Code Crim. Proc. Ann. art. 35.13, as opposed to after the entire panel is questioned in a non-capital case. Grijalva v. State, 614 S.W.2d 420 (Tex.Cr.App.1981). See also Turner v. State, 635 S.W.2d 734 (Tex.Cr.App.1982); and, Bell v. State, 724 S.W.2d 780, 795 (Tex.Cr.App.1986). A clear and concise reasoning for this holding can be found in Richardson v. State, 744 S.W.2d 65, 69-70 (Tex.Cr.App.1987):

FN9. Interestingly, the majority refers to United States v. Cornell as guiding established precedent for their holding. Ante at 392. Cornell is a precursor to Witherspoon/Witt error, and therefore, totally inapplicable to the instant case. Chief Justice Story's rationale in Cornell for excluding the prospective

Quaker venire members (because "Quakers entertain peculiar opinions on the subject of capital punishment,") would certainly be unacceptable today under the law. Id., 25 F.Cas. at 655-56.

In capital cases, however, it is ordinarily immaterial that the State had strikes remaining at the end of the voir dire examination. If the trial court erroneously sustains a State's challenge for cause over defense objection during individual voir dire in a capital case, this has the immediate effect of giving the State an additional peremptory strike. Grijalva v. State, 614 S.W.2d 420 (Tex.Cr.App.1981). As stated in Grijalva, supra at 424:

"The manner of exercising peremptory challenges is explicitly differentiated in Arts. 35.13 and 35.25, V.A.C.C.P. The procedure followed in Chambers [v. State, 568 S.W.2d 313 (Tex.Cr.App.1978)] and this case is stated in Art. 35.13, supra: 'A juror in a capital case in which the state has made it known it will seek the death penalty, held to be qualified, shall be passed for acceptance or challenge first to the state and then to the defendant. Challenges to jurors are either peremptory or for cause.' " On the other hand, in non-capital cases, such as those upon which Chambers relied, the procedure is quite different, as provided in Art. 35.25, supra:

" 'In non-capital cases and in capital cases in which the State's attorney has announced that he will not qualify the jury for, or seek the death penalty, the party desiring to challenge any juror peremptorily shall strike the name of such juror from the list furnished him by the clerk.' "

To allow the State to render harmless the improper challenge for cause and excusal of a venire member by the simple expedient of not using all of the State's peremptory challenges would be, as stated in Grijalva, supra at 424- 425:

... corruption of the peremptory strike practice that violates the terms of Art. 35.13, supra, and gives an unfair advantage to the State in the jury selection process.

First, to allow the State to exercise its peremptory challenges in a capital case after conclusion of the voir dire examination gives it the benefit of making its judgments with a perspective of the entire panel, a perspective that is not given the defendant.

Second, giving such a privilege to the State allows it to withhold its strikes until after the defendant has exercised his strikes, even though Art. 35.13, supra, explicitly states that the qualified venire man shall be passed first to the state and then to the defendant. The statute would give the benefit to the defendant in instances *399 where both sides might desire to strike the same venire man. Allowing the State to wait until the end of the selection process would transfer that benefit to the State.

Third, to allow retrospective exercise of peremptory challenges on appeal gives the State even greater advantages. When used on appeal the State effectively postpones exercise of its strikes until error has been found, and then with the benefit of the ruling of this Court as its guide the State can maximize the accuracy of the strikes not used at trial. In actuality this Court not only counsels the State, but actually exercises the strike for the State. In effect a peremptory strike against a prospective juror is transformed into a peremptory strike against a ground of error. (Emphasis in original).

The majority provides no explanation, whatsoever, why the above reasoning does not apply to appellant today.

B.

Because they were decided before the promulgation of Rule 44.2, neither Bell, supra, nor Richardson, supra, mention whether a criminal defendant has a substantial right to a jury selected pursuant to the legislative scheme prescribed Tex.Code Crim. Proc. Ann. chapter 35. But the question clearly answers itself. Certainly, all criminal defendants have a statutory right to a jury empaneled by the scheme prescribed by the Code of Criminal Procedure. To hold otherwise is to judicially repeal and wholly circumvent the legislative enactments that prescribe challenges for cause and the jury selection process in capital trials.

Moreover, both Bell, and Richardson, rely on Grijalva v. State, 614 S.W.2d 420 (Tex.Cr.App.1981), et. al., to declare that in a capital case, a trial judge errantly sustaining a State's challenge for cause commits reversible error. By following stare decisis and reversing

capital cases which contain this error, this Court has impliedly recognized that an accused has a substantial right in the trial judge exclusively sustaining challenges for cause proscribed by statute. If this substantial right did not exist, there would be no reason for the Bell /Richardson rule.

By standards of stare decisis, analysis of precedent, and logic, this court should not ignore its previous decisions and fail to hold that an accused has a substantial right in the trial court following legislative mandate during the jury selection process. To refuse to find such a substantial right would circumvent the legislative act that prescribed challenges for cause and jury selection process in capital trials.

C.

Moreover, the majority's interpretation of Rule 44.2(b) violates our rule making authority. The Legislature has specifically prohibited this Court from such actions by enacting the following statute:

(a) The court of criminal appeals is granted rulemaking power to promulgate rules of posttrial, appellate, and review procedure in criminal cases except that its rules may not abridge, enlarge, or modify the substantive rights of a litigant.

Tex. Gov't Code Ann. ? 22.108(a).

In Flowers v. State, 935 S.W.2d 131 (Tex.Cr.App.1996), this Court held that a substantial right, the right to appeal an involuntary plea, could not be barred by a new rule of appellate procedure. The same reasoning should be applied today; prior to today's majority opinion, capital defendants had a substantial right to appeal an error committed by the trial judge in errantly granting a challenge for cause by the State and to obtain a reversal of their convictions. The new rule, 44.2, should not be interpreted to deny a defendant reversal of his conviction. Such an interpretation abridges the defendant's rights and thereby, violates our rule making authority.

D.

A remaining problem with today's opinion is requiring an accused to show that a partial jury heard his case before this Court will

reverse for error in a trial judge improperly sustaining a State's challenge for cause. This he can not do. [FN10]

FN10. An exhaustive search of this court's published cases fails to identify a single instance of a case being reversed due to a partial jury. There have been numerous instances of unqualified or disqualified jurors hearing cases and causing reversals, but not a single case has hinged upon a partial jury as the majority now requires for reversal. Ante at 394.

***400** Texas Rules of Criminal Evidence ? 606(b) [now combined with the Texas Rules of Civil Evidence and renamed Tex. Rules of Evidence] bars jurors from testifying "as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon his or any other juror's mind or emotions as influencing him to assent or dissent from the verdict or indictment or concerning his mental processes in connection therewith ...". [FN11] No juror can testify regarding a bias or partiality affecting deliberations. No bias or partiality is revealed by jurors passively absorbing evidence as it is offered in the courtroom. A jury, once assembled, is allowed no opportunity to reveal any partiality. An accused can neither impeach a jury for partiality after the verdict has been delivered nor can he approach jurors after voir dire and before the trial has concluded.

FN11. For an excellent explanation of the utility and necessity of this bar, see Tanner v. United States, 483 U.S. 107, 107 S.Ct. 2739, 97 L.Ed.2d 90 (1987); McDonald v. Pless, 238 U.S. 264, 35 S.Ct. 783, 59 L.Ed. 1300 (1915); or, Buentello v. State, 826 S.W.2d 610 (Tex.Cr.App.1992).

An accused has no power to seek redress of this error once it occurs. Once voir dire has ended, the accused can not obtain information necessary to submit an allegation to a reviewing court that he was not tried by an impartial jury. Today's result-oriented holding sets a crippling and impossible standard for reviewing a trial judge's error in sustaining a State's challenge for cause in a capital case.

CONCLUSION

The effect of the majority opinion is to permit the State to request and the trial judges to grant unfounded challenges for cause thereby trampling the defendant's Constitutional rights to an impartial jury, due process of law and due course of law, and denying the defendant his substantial right to appeal and receive a reversal upon a breach of the legislative scheme for jury selection.

For all of the reasons stated above, I dissent.

MEYERS, Judge, dissenting.

I again find myself unenlightened by a majority opinion of this Court. Effective September 1, 1997, the Court promulgated a new rule for assessing harm arising from non-constitutional trial error. Tex.R.App. Proc. 44.2(b). It is now over a year past its inception and I have no better understanding of how to apply this rule than when it was promulgated.

I.

Texas Rule of Appellate Procedure 44.2(b), provides in part that as to non- constitutional error, "[a]ny other error, defect, irregularity, or variance that does not affect substantial rights must be disregarded." The first case to apply this portion of the new rule was King v. State, 953 S.W.2d 266, 271 (Tex.Crim.App.1997). There, the Court said "[a] substantial right is affected when the error had a substantial and injurious effect or influence in determining the jury's verdict[,]" citing Kotteakos v. U.S., 328 U.S. 750, 776, 66 S.Ct. 1239, 90 L.Ed. 1557 (1946). The Court concluded, in light of the overwhelming evidence of future dangerousness that was properly admitted, any error in admitting certain other evidence "did not have a substantial or injurious influence on the jury's decision." King, 953 S.W.2d at 273. More recently, in Johnson v. State, 967 S.W.2d 410 (Tex.Crim.App.1998), the Court concluded there was harm in the admission of certain evidence. We stated the test for assessing harm for nonconstitutional error: "[a] criminal conviction should not be overturned for non-constitutional error if the appellate

court, after examining the record as a whole, has fair assurance that the error did not influence the jury or had but a slight effect." Id. at 417.

And so it would seem that the Court had established the test under 44.2(b) as whether we can say with "fair assurance" that the error "did not influence the jury or had but a slight effect." But this analysis does not *401 appear in the majority opinion today. Today, the majority's conclusion that the error is harmless is based in part on "how the federal courts" and other jurisdictions have "treated such errors." Majority opinion at 391-392. A reading of these cases fails to reveal the applicable or controlling rule for assessing harm. Further, it is not even clear from some of these cases whether the question was one of harm or one of alleged constitutional error. For instance, in United States v. Prati, 861 F.2d 82, 87 (5th Cir.1988), the Court phrased the issue presented as whether the defendant's conviction "should be reversed because the trial judge erred in granting, over the defendant's objection, the government's challenge for cause of a prospective juror from the venire." In concluding "this is not a ground for reversing the defendant's convictions[,]" the Fifth Circuit relied on Ross v. Oklahoma, 487 U.S. 81, 108 S.Ct. 2273, 101 L.Ed.2d 80 (1988). There, the high Court addressed whether the erroneous grant of a State's challenge for cause violated the petitioner's "Sixth and Fourteenth Amendment right to an impartial jury, and his Fourteenth Amendment right to due process." Id. at 2277, 108 S.Ct. 2273. This is far from the question presented in this case which already presumes we are not dealing with constitutional error. [FN1]

FN1. Indeed, part of the problem in structuring Rule 44.2 as dependent upon whether the error is constitutional or non-constitutional is that virtually all statutes have some kind of constitutional basis. For example, while a defendant does not have a constitutional right to a certain number of peremptory strikes, the jury selection procedures provided for in the Code of Criminal Procedure are designed to achieve an end consistent with ensuring a defendant his constitutional right to a fair and impartial jury.

Which leads to the next analytical problem in the majority's opinion. The Court's conclusion that the error is harmless is also based upon reasoning that no "substantial right" of the defendant has been affected:

> [T]he ability of the State to have excluded the challenged juror ... would not have affected any substantial right of the defendant, because a defendant has no right that any particular individual serve on the jury. The defendant's only substantial right is that the jurors who do serve be qualified. The defendant's rights go to those who serve, not to those who are excused.

Majority opinion at 393. There are two problems with this. While on its face subsection (b) appears to be concerned with determining what a defendant's "substantial rights" are, in King and Johnson the Court couched the inquiry in terms of influence rather than rights. A larger problem is that the Court's conclusion that a "substantial right" was not violated sounds of a constitutional analysis:

> [A] defendant has no right that any particular individual serve on the jury. The defendant's only substantial right is that the jurors who do serve be qualified. The defendant's rights go to those who serve, not to those who are excused.

Majority opinion at 393. By saying there is no harm here because there is no showing the defendant did not get a fair and impartial jury, the Court renders a subsection (b) error--which pertains by definition to only non-constitutional error--harmless because it does not involve subsection (a) error, a constitutional violation!

II.

As discussed above, in King, we said the question under subsection (b) is whether we could say with fair assurance the error did not have "a substantial and injurious effect or influence in determining the jury's verdict." This test is derived from Kotteakos, supra. Following is the entire discussion from which that language appears:

> If, when all is said and done, the conviction is sure that the error did not influence the jury, or had but very slight effect, the verdict and the judgment should stand, except perhaps where the departure is from a constitutional norm or a specific command of Congress. But if one cannot say, with fair assurance, after

pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error, it is impossible to conclude that substantial rights were not affected. The ***402** inquiry cannot be merely whether there was enough to support the result, apart from the phase affected by the error. It is rather, even so, whether the error had substantial influence. If so, or if one is left in grave doubt, the conviction cannot stand.

Kotteakos, 328 U.S. at 764-65, 66 S.Ct. 1239 (citations omitted). In recent opinions discussing Kotteakos, the Supreme Court has not articulated the level of confidence as "fair assurance," but rather has emphasized the notion of "grave doubt" as lying at the heart of the standard articulated there. E.g., O'Neal v. McAninch, 513 U.S. 432, 115 S.Ct. 992, 995-98, 130 L.Ed.2d 947 (1995)(discussing at length "grave doubt" standard established in Kotteakos); United States v. Lane, 474 U.S. 438, 449, 106 S.Ct. 725, 88 L.Ed.2d 814 (1986)(quoting only "grave doubt" portion of Kotteakos analysis).

Viewing influence in terms of grave doubt makes the most sense in the context of subsection (b) of our new rule since it is easily contrasted with subsection (a), which also turns on the level of doubt. Thus, under subsection (b), if the reviewing court has grave doubt about whether a non- constitutional error substantially affected the jury's verdict, the party alleging harm must win. See O'Neal, supra. But, unlike former 81(b)(2), which required reversal unless the reviewing court determined beyond a reasonable doubt that the error did not contribute to the conviction or punishment, non-constitutional error under the new rule leads to reversal only when the reviewing court has grave doubt about its affect on the jury. In other words, a reviewing court should not reverse a conviction, even when the court cannot say beyond a reasonable doubt that the non-constitutional error did not contribute to the jury's decision on conviction or punishment, unless it has grave doubt about the effect of that error on the jury's determinations.

So, based upon King 's interpretation of subsection (b), and Kotteakos, appellant's conviction should be reversed only if we have grave doubt about the effect of the erroneous granting of the

State's challenge for cause on the jury's determination. Under former 81(b)(2), we held the erroneous grant of a State's challenge for cause was reversible error. Zinger v. State, 932 S.W.2d 511 (Tex.Crim.App.1996)(holding wrongful granting of State's challenge for cause reversible error); Howard v. State, 941 S.W.2d 102 (Tex.Crim.App.1996)(opinion on reh'g)(erroneous grant of State's challenge for cause reversible error). While Rule 44.2 imposes a less exacting standard, error in the voir dire context is no less impossible to gauge. Given the impossibility of knowing or even speculating about the effect of the improper grant of a State's challenge for cause, I would reserve grave doubt about the effect of that error on the jury's determinations. [FN2] Accordingly,*403 appellant's conviction should be reversed.

FN2. Because "[i]t is impossible to conclude that the erroneous exclusion or inclusion of a juror had an impact on the verdict actually reached" traditional harm analysis has not been applied. GEORGE E. DIX AND ROBERT O. DAWSON, 42 TEXAS PRACTICE ? 35.47 at 472 (1995). In Bell v. State, 724 S.W.2d 780 (Tex.Crim.App.1986), cert. denied, 479 U.S. 1046, 107 S.Ct. 910, 93 L.Ed.2d 860 (1987), we explained the rules for determining harm in the context of erroneous rulings on challenges for cause:

If a trial court erroneously overrules a defendant's challenge for cause, the defendant may establish harm by showing: (1) exhaustion of his peremptory challenges; (2) denial of a request for additional peremptory challenges; and (3) the seating of a juror upon whom the defendant would have exercised a peremptory challenge. East v. State, 702 S.W.2d 606 (Tex.Cr.App.1985); White v. State, 629 S.W.2d 701 (Tex.Cr.App.1981), cert. denied, 456 U.S. 938, 102 S.Ct. 1995, 72 L.Ed.2d 457 (1982); Hernandez v. State, 563 S.W.2d 947 (Tex.Cr.App.1978); Payton, supra. In non-capital murder cases, if the trial court erroneously grants a State's challenge for cause and excludes a qualified juror, the defendant may establish harm simply by showing that the State exhausted all of its peremptory challenges. In such a case the court has effectively given the State the benefit of an additional peremptory challenge. Payton, supra. See also Culley v. State, 505 S.W.2d 567 (Tex.Cr.App.1974); and

Weaver v. State, 476 S.W.2d 326 (Tex.Cr.App.1972). In capital murder cases, if the trial court improperly sustains a State's challenge for cause and excludes a qualified juror, over a defendant's objection, reversible error arises regardless of whether the State has exhausted its peremptory challenges. This is because peremptory strikes are exercised after each prospective juror is questioned, under Art. 35.13, V.A.C.C.P., as opposed to after the entire panel is questioned in a non-capital case. Grijalva v. State, 614 S.W.2d 420 (Tex.Cr.App.1981). See also Turner v. State, 635 S.W.2d 734 (Tex.Cr.App.1982).... When the trial court sua sponte excludes a qualified juror, the situation must be distinguished from a similar excusal that is prompted by the State. Grijalva, supra, held that any State's unused peremptory strikes remaining at the end of voir dire would not remove the harm of an erroneous excusal of a qualified juror. This conclusion is based on the notion that otherwise the State would receive three unfair advantages over the defense: (1) hindsight in exercising peremptory strikes that was denied to the defense; (2) the benefit of striking last that is statutorily given to the defense by Art. 35.13, V.A.C.C.P.; and (3) the benefit of having the court strike, on behalf of the State, a venireman on appeal after voir dire error has been pronounced. But Grijalva is founded on the notion that the State caused the improper excusal by issuing a challenge for cause, and is therefore penalized because of the advantages it would otherwise receive by holding a peremptory strike back. Where the trial judge, not the State, is solely responsible for the improper excusal, the justification for penalizing the State under Grijalva disappears. It is entirely appropriate in such a case to fall back on the rationale in Weaver, supra, Payton, supra, and Culley, supra, and assess harm to the defendant on whether the state had remaining peremptory strikes left at the close of the voir dire.

See also Zinger v. State, 932 S.W.2d 511 (Tex.Crim.App.1996)(holding wrongful granting of State's challenge for cause reversible error); Howard v. State, 941 S.W.2d 102 (Tex.Crim.App.1996)(opinion on reh'g) (erroneous grant of State's challenge for cause reversible error). I do not necessarily agree with this type of "harm analysis," see Anson v. State, 959 S.W.2d 203, 205-208 (Tex.Crim.App. 1997) (Meyers, J., concurring); Zinger, supra (Meyers, J., concurring), but it has been the law for a

long time. And the Court has held that the type of harm analysis applied to voir dire error under Rule 81(b)(2) will continue to apply under the new rule. Anson, supra (applying traditional voir dire harm analysis without regard to change in harm analysis under Rule 44.2).

With these comments, I dissent.

Supreme Court, U.S.
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NO. 98-1964

IN THE
UNITED STATES SUPREME COURT
OCTOBER TERM, 1998

GEORGE ALARICK JONES,
Petitioner,

v.

THE STATE OF TEXAS,
Respondent.

On Petition for Writ of Certiorari
To the Texas Court of Criminal Appeals

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. **Whether Jones' claim that the state court's refusal to follow its own precedent violates the Sixth, Eighth, and Fourteenth Amendments raises only a state law question and is thus not appropriate for the Court's review.**

2. **Whether Jones failed to raise in the court below his claim that the introduction of evidence of unadjudicated offenses in the punishment hearing of capital cases violates the Eighth and Fourteenth Amendments; whether the claim is otherwise without merit.**

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	2
JURISDICTION	2
CONSTITUTIONAL PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	2
A. Course of Proceedings and Disposition Below.	2
B. Statement of Facts	3
1. Guilt-Innocence Phase	3
2. Punishment Phase	5
REASONS FOR DENYING THE WRIT	7
I. The Question Presented for Review Is Unworthy of this Court's Attention.	7
II. Jones' claim that the state court's refusal to follow its own precedent violates the Sixth, Eighth, and Fourteenth Amendments raises only a state law question and is thus not appropriate for theCourt's review.	7

TABLE OF CONTENTS, Continued

III. **Jones failed to raise his claim that the introduction of evidence of anjudicated offenses in the punishment hearing of capital cases violates the Eighth and Fourteenth Amendments in the cou-t below; the claim is also without merit.** 14

CONCLUSION 19

TABLE OF AUTHORITIES

Cases	Page
Barclay v. Florida, 463 U.S. 939 (1983)	17
Barefoot v. Estelle, 463 U.S. 880 (1983)	17,19
Batson v. Kentucky, 476 U.S. 79 (1986)	9,13
Bd. of Directors of Rotary Int'l v. Rotary Club, 481 U.S. 537 (1987)	15
Beck v. Washington, 369 U.S. 541 (1962)	15
Bell v. State, 724 S.W.2d 780, (Tex.Cr.App. 1986)	11
Bouie v. City of Columbia, 378 U.S. 347 (1964)	12
Callins v. Collins, 998 F.2d 269 (5th Cir. 1993), *cert. denied*, 114 S. Ct. 1127 (1994)	16
Cardinale v. Louisiana, 394 U.S. 437 (1969)	14,15
Crowell v. Randall, 10 Pet. 368 (1836)	14
Duff-Smith v. Collins, 973 F.2d 1175 (5th Cir. 1992)	16
Edmonson v. Leesville Concrete Co., Inc., 500 U.S. 614 (1991)	9
Exxon Corp. v. Eagerton, 462 U.S. 176 (1983)	15
Frank v. Mangum, 237 U.S. 309 (1915)	12
Fuller v. Oregon, 417 U.S. 40 (1974)	15

TABLE OF AUTHORITIES, Continued

Cases	Page
Godchaux Co., Inc. V. Estopinal, 251 U.S. 179 (1919)	15
Gray v. Mississippi, 481 U.S. 648 (1987)	8
Grijalva v. State, 614 S.W.2d 420 (Tex.Cr.App. 1981)	11
Harris v. Johnson, 81 F.3d 535 (5th Cir.), *cert. denied,* 517 U.S. 1227 (1996)	18
Heath v. Alabama, 474 U.S. 82 (1985)	14
Hill v. California, 401 U.S. 797 (1971)	14
Hohn v. United States, 524 U.S. 236 (1998)	11
Jurek v. Texas, 428 U.S. 262 (1976)	16,18
Illinois v. Gates, 462 U.S. 213 (1983)	14
Marks v. United States, 430 U.S. 188 (1997)	12
McGowan v. Maryland, 366 U.S. 420 (1961)	18
Milton v. Procunier, 744 F.2d 1091 (5th Cir. 1984), *cert. denied,* 470 U.S. 1030 (1985)	16
Owings v. Norwood's Lessee, 5 Cranch 344 (1809).....	15
Payne v. Tennessee, 501 U.S. 808 (1991)	11
Ross v. Oklahoma, 487 U.S. 81 (1988)	9,10

TABLE OF AUTHORITIES, Continued

Cases	Page
Skipper v. South Carolina, 476 U.S. 1 (1986)	19
Street v. New York, 394 U.S. 576 (1969)	15
Tacon v. Arizona, 410 U.S. 797 (1971)	14
Turner v. State, 635 S.W.2d 734 (Tex.Cr. App. 1982).	10
United States v. Grayson, 438 U.S. 41 (1978)	17
Williams v. Lynaugh, 814 F.2d 205 (5th Cir.), *cert. denied,* 484 U.S. 935 (1987)	16
Williams v. New York, 337 U.S. 241 (1949)	17
Witherspoon v. Illinois, 391 U.S. 510 (1968)	8,9,13
Constitutions, Statutes and Rules	
U. S. Const., amend. V	12
U. S. Const., amend. VI	*PASSIM*
U. S. Const., amend. VIII	*PASSIM*
U. S. Const., amend. XIV	*PASSIM*
U.S. Const. Art. I, § 10	12
28 U.S.C. § 1257(a)	2
TEX. CODE CRIM. PROC. ANN. art. 35.16(b)(3)	8
TEX. CODE CRIM. PROC. ANN. art. 37.07	18
TEX. CODE CRIM. PROC. ANN. art. 37.071	3,18

TABLE OF AUTHORITIES, Continued

Statutes, Constitutions, and Rules	**Page**
TEX. PENAL CODE § 19.03(a)(2)(West 1996 Supp.)	2
TEX. GOVERNMENT CODE § 22.018	11
TEX.R.APP.PROC. 44.2(b)	13
Sup. Ct. R. 10	7
Miscellaneous	
Judiciary Act of 1789, 20 § 25, I. Stat. 85	15

NO. 98-1964

IN THE
UNITED STATES SUPREME COURT
OCTOBER TERM, 1998

GEORGE ALARICK JONES,

Petitioner,

v.

THE STATE OF TEXAS,

Respondent.

On Petition for Writ of Certiorari
To the Texas Court of Criminal Appeals

RESPONDENT'S BRIEF IN OPPOSITION

TO THE HONORABLE JUSTICES OF THE SUPREME COURT:

NOW COMES the State of Texas, Respondent[1] herein, by and through the Attorney General of Texas, and files this

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[1] The Petitioner will be referred to as "Jones," and the Respondent as "the State." "Pet." refers to the Petition; "SR" refers to the transcription of the testimony at trial, by volume and page number.

Brief in Opposition.

OPINION BELOW

The published opinion of the Texas Court of Criminal Appeals affirming Jones' conviction and sentence of death is attached to Jones' petition. *Jones v. State*, 982 S.W.2d 386 (Tex. Crim. App. 1998) (en banc).

JURISDICTION

Jones seeks to invoke the jurisdiction of this Court under the provisions of 28 U.S.C. § 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Jones bases his claims upon the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.

STATEMENT OF THE CASE

A. Course of Proceedings and Disposition Below

Jones was indicted on September 21, 1994, in the 292nd Judicial District Court of Dallas County, Texas, for the capital offense of murdering Forest J. Hall while in the course of robbery.[2] *See* TEX. PENAL CODE ANN. § 19.03(a)(2) (West 1996 Supp.). Jones was tried before a jury upon his

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[2] This was Jones' second trial. A mistrial was declared after eight jurors were selected in his first trial.

plea of not guilty and found guilty of the capital offense on March 22, 1995. On March 29, 1995, following a separate punishment hearing, the jury answered the statutory special issues submitted pursuant to Texas Code of Criminal Procedure Article 37.071 "yes" and "no", respectively. In accordance with state law, the trial court assessed Jones' punishment at death.

Jones appealed his conviction and sentence to the Court of Criminal Appeals of Texas, which affirmed his conviction and sentence on September 16, 1998. *Jones v. State*, 982 S.W.2d 38 (Tex. Cr. App. 1998) (en banc). This petition followed.

B. Statement of Facts

1. Guilt-Innocence Phase

The victim, Forest Hall, was 22 years old and employed by Parkland Hospital. On April 13, 1993, the day of the murder, Hall drove his vehicle to work. 54 SR 45. The vehicle had a stereo and small wheels. 54 SR 44. Hall left work at 4:45 p.m. 54 SR 46. Hall's body was found in a roadside ditch later on April 13, 1993. Two gunshots had been heard at 5:30 p.m. 54 SR 49. Hall's body was face down in the ditch with his hands up beside his head. 54 SR 63-64. Hall died of a gunshot wound to the head. 54 SR 32. The gunshot wounds to Hall's head were consistent with the murderer having leaned over him and fired the two shots, at close range, into his head while Hall was lying in the ditch. 54 SR 30.

Hall's vehicle was found the next day missing its tires, wheels, stereo, and speakers. 54 SR 99, 108. Pawnshop records indicated that Jones sold four tires with rims on the day of the murder for $75.00. Jones produced identification at the pawnshop and signed the bill of sale. 54 SR 114-15. Forensic document examiner Allen Southmayd compared the signature on the pawn ticket with Jones' known signature and concluded that the same person signed both. 56 SR 321-22.

On April 19, 1993, Lancaster police officer Chris Pearson approached a suspicious vehicle whose driver then drove into a housing project, got out of the vehicle, and fled. The vehicle had been reported stolen and contained a 380 automatic pistol with a bullet in the clip. 54 SR 119-24. Robert Pool, a firearms examiner, determined that the pistol found by Pearson fired the bullet retrieved from the body of Hall during the autopsy. 54 SR 136.

Derrick Rodgers, Jones' co-defendant who was awaiting trial for the same capital murder, testified that he, Jones, the mother of Rodgers' child, and several friends went to the Red Bird shopping mall on the afternoon of Hall's murder. 56 SR 276. They observed Hall and when he returned to his car, Jones got into the driver's seat, forcing Hall into the front seat with Jones, and Rodgers got in the back seat. Jones had a 380 caliber gun. 56 SR 279. Katoma Rodgers and a friend followed in another car. After the cars were parked in a rural area, Rodgers told Hall to get out of the car and run, but Jones refused to let Hall go since he could identify them. 56 SR 281. Jones shot Hall twice in the back of the head as Hall lay in the grass. Jones and Rodgers then left in Hall's car. 56 SR 283-84.

Jones and Rodgers met Katoma Rodgers and friends at a McDonald's. 56 SR 285. Katoma asked Jones why he killed Hall, and Jones told her he did it because Hall had begged for his life saying that he had a son. Jones told Katoma that he killed Hall so that he would not get to see his son. 56 SR 339.

Jones gave the police a statement, after speaking with his mother by telephone, in which he admitted that he had fired one of the shots that hit Hall in the head. 56 SR 301, 310.

2. Punishment Phase

The State produced evidence of other similar crimes by Jones. Charles Fulenwinder testified that near midnight on October 22, 1992, he observed his Cadillac in the middle of the street. When he went out to his car, a man ran from the rear of the car and shot at him three times. He identified Jones as the man who shot at him. 57 SR 402-3, 409.

Evidence of an additional three carjackings was introduced. 57 SR 447, 456-60, 470-74.

Several witnesses, including Jamoan Martin, testified about the murder of Kindra Buckner, a 20-year-old girl who left work shortly after 10 p.m. on September 20, 1993. Martin and Jones drove into the field in which she was walking and told her, at gunpoint, to get into the car. 61 SR 788-89. They parked the car and made her take off her clothes. 61 SR 789. Jones searched her purse and then shot her twice. 61 SR 791. After driving away, Jones became

concerned that she might still be alive and returned to the scene. Jones told Martin to shoot her with the shotgun, which he did. 61 SR 792-94. Jones then burned the car. 61 SR 794.

Dallas police officer Bruce Adams testified that on September 28, 1993, Jones was brought in and photographed. The photographs show Jones with burn marks and a bandage on his left arm. 60 SR 670-71. The State introduced a certified copy of Parkland Hospital records showing that Jones was treated for burns on his face and arms. 60 SR 672.

Diane McLucky, a Dallas police officer in the gang unit, testified that Jones was a member of the Crips. His tattoos identified him as a gang member. 61 SR 742-43.

The defense presented Dr. James Marquart, who testified on the issue of future dangerousness. 62 SR 846-57. In his opinion, Jones would not have been a threat to prison society. 62 SR 857.

James Carl McAbe, a clinical psychologist, testified as to his psychological evaluation of Jones. 62 SR 871-84.

Nine persons, including Jones' father, testified as character witnesses in mitigation of punishment.

REASONS FOR DENYING THE WRIT

I.

The Questions Presented for Review Are Unworthy of this Court's Attention.

Rule 10 of the Rules of the Supreme Court provides that review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only for compelling reasons. Jones advances no compelling reason in this case, and none exists. Further, the issues in this case involve only the application of established constitutional principles to the facts. Thus, the petition presents no important question of law to justify this Court's exercise of its certiorari jurisdiction.

II.

Jones' claim that the state court's refusal to follow its own precedent violates the Sixth, Eighth, and Fourteenth Amendments raises only a state law question and is thus not appropriate for the Court's review.

Jones claims that the Court of Criminal Appeals failed to follow its own precedent in holding that the wrongful exclusion of a juror on a purely state law matter was subject to harmless error analysis. In a circular fashion, he posits the argument that the erroneous exclusion of a juror in a capital case violates constitutional law which means that the jury was not fair and impartial and the trial was fundamentally unfair.

While Jones has cited numerous cases, none of the cases cited are authority for this position.

At the trial, the State challenged prospective juror Margaret Snyder and the challenge was sustained by the district court on the ground that Snyder would require the State to produce a higher degree of proof of credibility of an accomplice witness than of other witnesses. The court also indicated, but did not hold, that Snyder would not be qualified on her definition of society. 29 SR 2419.

On appeal, the Texas Court of Criminal Appeals held that Snyder was improperly excluded, but that such exclusion was not harmful and did not merit reversal. The Court of Criminal Appeals specifically found the error not to be of constitutional dimension, but instead "a mistaken application of Article 35.16(b)(3) [TEX. CODE CRIM. PROC.]." *Jones,* 982 S.W.2d at 391.

Jones contends that this Court has already concluded that the erroneous exclusion of a juror in a capital case violates a capital defendant's constitutional rights. *Witherspoon v. Illinois,* 391 U.S. 510 (1968). In *Gray v. Mississippi*, 481 U.S. 648 (1987), the Court held that the improper *Witherspoon* exclusion of a juror is not subject to harmless error review. *Gray*, 481 U.S. at 662. However, *Witherspoon* and its progeny, including *Gray*, do not stand for the proposition that a defendant in a capital case has an affirmative constitutional right to retain *Witherspoon* or otherwise qualified jurors. *See Ross v. Oklahoma*, 487 U.S. 81, 87 (1988) ("declin[ing] to extend the rule of *Gray* beyond its context: the erroneous '*Witherspoon* exclusion' of a

qualified juror in a capital case"). Thus, a claim that a juror was erroneously excluded on purely state law, non-constitutional grounds does not justify the granting of certiorari review.

Jones further contends that this Court has held that equal protection is violated when a qualified juror has been improperly excluded. Pet. at 17. He cites *Batson v. Kentucky,* 476 U.S. 79 (1986), and *Edmondson v. Leesville Concrete Co., Inc.,* 500 U.S. 614 (1991), in support of this contention and argues that Snyder has, under the holdings of those cases, a constitutionally protected right to sit as a juror unless disqualified or peremptorily challenged. He further claims that Jones has standing to complain of the violation of Snyder's rights. Pet. at 17-18. However, the Court of Criminal Appeals specifically found no *Batson* violation, and, as *Ross* has held, the Constitution is not implicated by the erroneous exclusion of a juror when that exclusion violates neither *Witherspoon* nor *Batson.*

Jones' claim that the wrongful exclusion of Snyder resulted in the State receiving an extra strike has been rejected. In *Ross,* the Court held that the loss of a peremptory challenge does not constitute a violation of the Sixth Amendment right to an impartial jury. Since peremptory challenges are created by statute and are not constitutionally required, the defendant is only entitled to receive that which he is provided by state law. *Ross v. Oklahoma,* 487 U.S. at 88-89. Jones has not alleged that he was denied a peremptory challenge, only that the State, due to the exclusion error, received, in effect, an additional challenge.

The Court has made clear that the appropriate determination is not whether a juror was wrongfully excluded on a non-constitutional basis, but instead whether the jury which sat was fair and impartial. Jones has advanced no argument that the jury was not impartial other than the circular one that he was denied an impartial jury because Snyder was erroneously rejected. Specifically, Jones contends that the Court of Criminal Appeals erred in finding that his only right was to a fair and impartial jury. Pet. at 20. Since that argument has been explicitly rejected in *Ross,* no claim of constitutional dimension is presented.

Jones' final contentions regarding Snyder's erroneous exclusion are limited to state law matters over which this Court has no jurisdiction. He contends that the court failed to follow its own precedent, thereby promulgating a retroactive rule which violates the *Ex Post Facto* Clause; that valid case law of Texas which Jones relied upon at trial was not followed; and that the state court's decision relies upon a case which is inappropriate in a death penalty context.

Jones contends that the Court of Criminal Appeals wholly disregarded its own previous rulings as to challenges for cause in capital cases, citing *Bell v. State,* 724 S.W.2d 780 (Tex.Cr.App. 1986), *Turner v. State,* 635 S.W.2d 734 (Tex. Cr.App. 1982), and *Grijalva v. State,* 614 S.W.2d 420 (Tex.Cr.App. 1981). Jones claims to have relied upon this case law at trial and at direct appeal.[3] Pet. 24. Obviously, the court may change its view of its own precedent without

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[3] Jones has not explained how he relied upon this case law and what detriment accrued from such reliance.

triggering constitutional concerns. To the extent that Jones attacks the Court of Criminal Appeals' failure to abide by the principle of stare decisis, he could have had no reasonable, objective expectation that this principle would guarantee him relief from his death sentence in this case. "Stare decisis is not an inexorable command; rather, it 'is a principle of policy and not a mechanical formula of adherence to the latest decision.'" *Payne v. Tennessee*, 501 U.S. 808, 828(1991) (citation omitted). "The role of stare decisis, furthermore, is 'somewhat reduced . . . in the case of a procedural rule . . . which does not serve as a guide to lawful behavior.'" *Hohn v. United States*, 524 U.S. 236, ___, 118 S.Ct. 1969, 1977 (1998).

Jones finally contends that the court's failure to follow precedent constitutes the promulgation of a retroactive rule which abridges his constitutional rights and thus violates the rulemaking authority of the Court of Criminal Appeals and also the *Ex Post Facto* Clause. Pet. at 22. Whether the court has violated its authority to promulgate rules pursuant to state statute is not a constitutional issue. The court has, however, not done so and the allegation is meritless. Jones mistakes the court's decision in his case on direct appeal for a "rule" promulgated pursuant to the authority of the Texas Government Code. Section 22.108, TEX. GOVT. CODE, grants rulemaking power to promulgate rules for posttrial, appellate, and review procedure in criminal cases to the court. The clerk of the court then files such rules with the secretary of state and they are published in the Texas Register and in the Texas Bar Journal. This procedure was not followed with the court's holding in Jones' direct appeal for the obvious reason that it was a decision, not a rule.

The decision in Jones' direct appeal does not violate the *Ex Post Facto* Clause. While the *Ex Post Facto* Clause is generally considered to be a limitation upon the powers of the legislature and not applicable to the judiciary, *Frank v. Mangum*, 237 U.S. 309, 344 (1915), the principle that persons have a right to fair warning of that conduct which will give rise to criminal penalties is protected against judicial action by the Due Process Clause of the Fifth Amendment. *Bouie v. City of Columbia*, 378 U.S. 347 (1964). In *Bouie,* the Court reversed trespass convictions which resulted from a judicial enlargement of the state criminal trespass statute. The Court held that such unforeseen judicial enlargement of a criminal statute, applied retroactively, operates precisely like an ex post facto law forbidden by Art. I, § 10, of the Constitution. What is protected by the *Ex Post Facto* Clause is the right to fair warning of that conduct which will give rise to criminal penalties. *Marks v. United States,* 430 U.S. 188, 191 (1997).

The decision of the Texas Court of Criminal Appeals did not enlarge the Texas capital murder statute or in any way extend the criminal penalties to which Jones would be subject. It simply applied state law to reach a decision regarding the error in excluding Snyder. Specifically, the court determined that the error was not of constitutional dimension since the improper exclusion did not violate *Witherspoon* or *Batson,* and then applied Rule 44.2(b), TEX. RULES APP. PROC., which requires that errors which are not of constitutional dimension and do not affect substantial rights be disregarded. If this resulted in a change in the case law regarding challenges for cause, such change did not enlarge the criminal offense with which Jones was charged. It also did not change any law on which Jones or his attorneys

relied in making decisions as to which jurors to challenge. Jones has not set forth one strategic decision that he or his attorneys would have changed nor identified a single juror or venire member whom they would have treated differently in exercising challenges as a result of this decision by the court. The only right at issue is the right to a fair and impartial jury, and Jones has not established that his jury did not meet the Sixth Amendment standard.

Jones has presented merely a state law claim that this Court is without jurisdiction to consider. In an attempt to create the indicia of a constitutional claim, Jones has argued that he has a constitutional right to every qualified juror not properly challenged, but such right does not exist. However the claim is posited, it remains a state law matter and unworthy of review.

III.

Jones failed to raise in the court below his claim that the introduction of evidence of unadjudicated offenses in the punishment hearing of capital cases violates the Eighth and Fourteenth Amendments; the claim is also without merit.

Jones next contends that the admission of evidence of unadjudicated offenses during the punishment phase of capital murder trials in Texas violates the capital defendant's Fourteenth Amendment rights to due process and equal protection and also the Eighth Amendment. Specifically, he suggests that such evidence is inherently unreliable and is only permitted in capital cases, state law barring

consideration of such evidence in all other criminal cases in Texas. *See* Pet. at 31. However, this issue was not raised and decided in the court below; therefore, this Court is without jurisdiction to pass on it. Moreover, even if the issue were properly before the Court, the issue is entirely without merit.

The cases are legion that this Court will not decide issues raised for the first time on petition for certiorari, and that the Court will not decide federal questions not raised and decided in the court below. *E.g., Heath v. Alabama*, 474 U.S. 82, 87 (1985); *Illinois v. Gates*, 462 U.S. 213, 218-222 (1983); *Tacon v. Arizona*, 410 U.S. 351, 352 (1973); *Hill v. California*, 401 U.S. 797, 805-806 (1971); *Cardinale v. Louisiana,* 394 U.S. 437, 438 (1969). In articulating this requirement, the Court has stressed the long-standing nature of the rule: "[I]n *Crowell v. Randall*, 10 Pet. 368 (1836), Justice Story reviewed the earlier cases commencing with *Owings v. Norwood's Lessee*, 5 Cranch 344 (1809), and came to the conclusion that the Judiciary Act of 1789, 20 § 25, 1 Stat. 85, vested this Court with no jurisdiction unless a federal question was raised and decided in the state court below. 'If both of these do not appear on the record, the appellate jurisdiction fails.' 10 Pet. 368, 391." *Cardinale v. Louisiana*, 394 U.S. at 439. To properly invoke the jurisdiction of the Court, it is crucial that the federal question not only be raised in the prior proceedings, but that it be raised at the proper point. *Beck v. Washington*, 369 U.S. 541, 550 (1962); *Godchaux Co., Inc. v. Estopinal*, 251 U.S. 179, 181 (1919). Moreover, on direct review,

> [w]hen "'the highest state court has failed to pass upon a federal question, it will be assumed

> that the omission was due to want of proper presentation in the state courts, unless the aggrieved party in this Court can affirmatively show the contrary.'"

Bd. of Directors of Rotary Int'l v. Rotary Club, 481 U.S. 537, 550 (1987), *quoting Exxon Corp. v. Eagerton*, 462 U.S. 176, 181 n.3 (1983), *quoting Fuller v. Oregon*, 417 U.S. 40, 50 n.11 (1974), *quoting Street v. New York*, 394 U.S. 576, 582 (1969). Consequently, because the federal question raised in the instant petition for certiorari review was neither raised in nor decided by the Texas Court of Criminal Appeals, this Court cannot decide the issue.

Further, even assuming the issue was properly before this Court, Jones has failed to show that the admission of evidence of unadjudicated offenses in this case has resulted in the denial of his constitutional rights.

This precise claim has been rejected by the Fifth Circuit Court of Appeals. The Fifth Circuit has repeatedly held that the introduction of unadjudicated offenses does not violate a capital defendant's rights under the Eighth Amendment or the Due Process Clause of the Fourteenth Amendment. *Callins v. Collins*, 998 F.2d 269, 276 (5th Cir. 1993), *cert. denied*, 510 U.S. 1141 (1994); *Duff-Smith v. Collins*, 973 F.2d 1175, 1184 (5th Cir. 1992); *Williams v. Lynaugh*, 814 F.2d 205, 207-08 (5th Cir.), *cert. denied*, 484 U.S. 935 (1987), *citing Milton v. Procunier*, 744 F.2d 1091, 1097 (5th Cir. 1984), *cert. denied*, 470 U.S. 1030 (1985). The Fifth Circuit has also held that the introduction of evidence of unadjudicated offenses during a capital

sentencing hearing while excluding such evidence in trials of non-capital defendants does not violate equal protection. *Harris v. Johnson,* 81 F.3d 535 (5th Cir.), *cert. denied* 517 U.S. 1227 (1996).

There is no support for Jones' argument that the Eighth Amendment prohibits the admission of unadjudicated offense evidence at the punishment phase of a capital murder trial. In fact, the Eighth Amendment supports the admission and jury consideration of all evidence relevant to the sentencing determination, whether aggravating or mitigating, in order to arrive at the most accurate determination possible. A capital defendant's criminal record and prior bad acts are aspects of his character and background that are properly considered by a jury in determining the appropriateness of a death sentence. *Barclay v. Florida*, 463 U.S. 939, 956-58 (1983).

Further, the determination in *Jurek v. Texas* that the Texas capital-sentencing statute was constitutional was premised in part on the fact that the jury was allowed to consider all possible information relevant to the punishment phase issues. 428 U.S. 262, 271, 274-76 (1976). As was stated in *Jurek*, "[w]hat is essential is that the jury have before it all possible relevant information about the individual defendant whose fate it must determine." *Jurek*, 428 U.S. at 276.

Texas' interest in permitting sentencer consideration of the full range of relevant evidence is not merely legitimate but compelling. Admission of unadjudicated offense evidence furthers the state's interest in promoting the

accuracy of the sentencer's response to the future dangerousness issue. Where evidence is relevant the reliability of the evidence is an issue that goes to its weight rather than its admissibility. *Barefoot v. Estelle,* 463 U.S. 880, 898-99 (1983). Thus, the admission of the unadjudicated offense evidence did not deprive either Jones or any other capital defendant of a reliable sentencing determination under the Eighth Amendment.

Likewise, the Due Process Clause is not implicated by the admission of evidence of unadjudicated offenses during the punishment phase of trial. The law is clear that a sentencing body can consider a defendant's participation in criminal conduct for which he has not been convicted without violating due process. *United States v. Grayson,* 438 U.S. 41, 49 (1978), *citing Williams v. New York,* 337 U.S. 241, 252 (1949). The premise underlying the American system of criminal justice is that the adversary process and the trier of fact are "competent to uncover, recognize, and take due account" of weaknesses in evidence. *Barefoot v. Estelle*, 463 U.S. at 899. Jones had the opportunity to test the veracity and credibility of the witnesses, and to challenge the reliability of their testimony, through cross-examination. He had the opportunity, if he was able to do so, to rebut the State's case with evidence of his own.

Jones also alleges that because Texas allows for the introduction of unadjudicated offenses in capital sentencing trials but does not allow such evidence in noncapital cases, the Texas capital sentencing procedure violates his right to equal protection under the Fourteenth Amendment. The statutory scheme in Texas does not implicate equal protection

because capital defendants and non-capital defendants are not similarly situated, and any disparate treatment is rationally related to the state's legitimate interest in assuring that all relevant information is presented for consideration by a capital jury in answering the special issues.

Differences between the Texas capital and non-capital sentencing procedures warrant differential treatment of unadjudicated offense evidence. In capital cases, the jury's discretion is guided by consideration of special issues, and its responses to those issues determine punishment in a particular case. Tex. Code Crim. Proc. Ann. art. 37.071(b), (e). In non-capital cases, in contrast, the sentencer is free to assess any sentence within the range delineated by statute. Tex. Code Crim. Proc. Ann. art. 37.07. Capital and non-capital defendants, thus, are not similarly situated with respect to sentencing procedures.

Since capital defendants have not been found to be a suspect class for equal protection purposes, the rational basis test should be used to test Texas' sentencing procedure. Rational basis scrutiny requires only that the legislative classification rationally promote a legitimate governmental objective. This constitutional standard is "offended only if the classification rests on grounds wholly irrelevant to the achievement of the state's objective." *McGowan v. Maryland*, 366 U.S. 420, 425 (1961). The purpose of allowing evidence of unadjudicated offenses to be considered in the sentencing phase is to assist the jury in determining whether the defendant is likely to be a continuing threat to society. This evidence helps focus the jury on the particular circumstances of the individual offense and the individual offender. *Jurek*,

428 U.S. at 273. Admission of all evidence regarding the defendant at capital sentencing furthers the state's interest in assuring sentencer consideration of evidence about the individual defendant. It is directly relevant to the jury's assessment of future dangerousness, which is a constitutionally permissible sentencing criterion. *Barefoot v. Estelle*, 463 U.S. at 896. "Consideration of a defendant's past conduct as indicative of his probable future conduct is an inevitable and not undesirable element of capital sentencing." *Skipper v. South Carolina*, 476 U.S. 1, 5 (1986). Texas has a strong interest in ensuring that all relevant evidence concerning the capital defendant is placed before the jury so that it can consider the evidence when answering the special issues. In furthering this interest, the state could rationally decide that different procedures should be used for capital defendants than for noncapital defendants. Jones' second claim also does not merit the granting of certiorari review.

CONCLUSION

For the foregoing reasons, the State respectfully requests that the petition for writ of certiorari be denied.

Respectfully submitted,

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